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In the Supreme Court of the United States

OCTOBER TERM, 1946

AYRSHIRE COLLIERIES CORPORATION, A CORPORATION, ET AL., AND CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The report of the Interstate Commerce Commission herein involved (R. 164) is reported in 263 I. C. C. 179. The findings of fact and conclusions of law of the District Court (no opinion was filed) are set forth at R. 108.

JURISDICTION

The final decree of the District Court (R. 111) was entered June 5, 1946, and the appeal was allowed August 1, 1946 (R. 119). Probable jurisdiction was noted, October 21, 1946 (R. 1675). The Court's jurisdiction rests on the Urgent Deficiencies Act of October 22, 1913 (c. 32, 38 Stat. 210, 219, 220; 28 U. S. C. 45 and 47a) and section 238 of the Judicial Code as amended by the Act of February 12, 1925 (c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C. 345).

STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix.

QUESTIONS PRESENTED

1. Whether, after a hearing before a three-judge district court, a majority of the three judges may render a decision, the third judge being absent due to illness.

2. Whether, in an Investigation and Suspension proceeding involving certain rate schedules filed by carriers, the Interstate Commerce Commission may consider the lawfulness of the previously existing rates, republished in such schedules, as well as of the new rates proposed therein.

3. Whether the facts of record herein (disclosing, among other things, that a rail carrier maintained single-line rates, applicable to move-

ments exclusively over its own rails, which were lower than joint-line rates voluntarily maintained by it at the same time between the same destinations and origin-groups in conjunction with other carriers) warranted findings of discrimination and preference empowering the Commission to make its order prescribing rates.

STATEMENT

These are direct appeals from a final decree (R. 111) of a specially constituted district court dismissing as without merit two complaints (consolidated for hearing, R. 54), seeking the enjoining and setting aside of an order of the Interstate Commerce Commission entered in a proceeding entitled Investigation and Suspension Docket No. 5139, *Coal to Beloit, Wis., And Northern Illinois.* The appellants in one of the cases are certain companies and individuals engaged in mining coal in Indiana and the Coal Trade Association of Indiana, and the appellant in the other cause is the Chicago, Milwaukee, St. Paul and Pacific Railroad Company.

The Commission proceeding R. 3, an I. & S. proceeding under section 15 (7) of the Interstate Commerce Act, was instituted July 30, 1942, on protest, or complaint, of Indiana coal-shipping interests asking for investigation of the lawfulness of rates, proposed by certain railroads, on bituminous coal, in carloads, from mines in In-

diana to Beloit, Wis., and certain northern Illinois destinations, and from mines in western Kentucky to the Illinois destinations. The rates proposed were suspended by the Commission for the statutory period and thereafter by the railroads voluntarily until disposition of the proceeding. The I. & S. proceeding (R. 4) was heard together with a proceeding under section 13 (3) and (4) of the Act, No. 28881, *Bituminous Coal Rates Within Illinois,* which was instituted upon petition of the principal railroads operating in Illinois wherein they alleged that the intrastate rates on bituminous coal, in carloads, from mines in Illinois to the same northern Illinois destinations caused undue preference and prejudice as between persons and localities in intrastate commerce on the one hand, and interstate commerce on the other, and unjust discrimination against interstate commerce. The two proceedings and related proceedings of the Illinois Commission (R. 166) were heard under the cooperative plan agreed upon between the Commission and the various State commissions. In accordance therewith, representatives of the Illinois Commission sat with the Commission's examiner at the hearings and two members of that Commission joined the members of the Interstate Commerce Commission in hearing the oral argument. Numerous traffic bureaus, coal producers, chambers of commerce, and shipper associations were represented at the hearings (R. 166).

The Commission report, issued July 9, 1945 (R. 164), embraced its determinations and findings in both I. & S. No. 5139 and in No. 28881. Its order entered in the I. & S. proceeding (R. 222) required the respondent railroads to cancel their schedules of proposed rates, without prejudice to the establishment of rates on the bases approved in the report, and further that they desist from practicing the unjust discrimination and undue prejudice and preference found in the report to exist and publish, maintain and apply rates which will avoid and remove such unjust discrimination and undue prejudice and preference. The order entered in No. 28881, though not under attack, is closely related to the order in I. & S. No. 5139. It required the railroads, respondents in that proceeding, to desist from practicing the unjust discrimination against interstate commerce found in the report to exist and to establish, maintain and apply, for the intrastate transportation of coal involved, rates no lower than the approved rates or on the rate bases as indicated in said report.

Bituminous coal is produced in great quantities in the coal fields of Indiana, Illinois, and western Kentucky, collectively, known as the midwestern field, and a natural market for the production is the section of the country north and west thereof, including Illinois, Wisconsin, and Iowa. In each of the origin states of Indiana and Illinois there

are several producing areas which have long been grouped for rate-making purposes. In Indiana, the most northerly is the group known as Brazil-Clinton (hereinafter called the Brazil). The Indiana groups south thereof are, in the order of their distances, the Linton-Sullivan (hereinafter called the Linton), the Princeton-Ayrshire (hereinafter called the Princeton), and the Boonville group, located near the southern boundary of the state. In Illinois, the most northerly mine group is that known as the Northern Illinois. The Illinois groups south of the Northern Illinois group are, among others, the Fulton-Peoria, the Springfield, the Belleville, and the Southern Illinois, the latter group being located in the southeastern part of the state and not far from Kentucky and southwestern Indiana. In Kentucky, the mine group known as the Western Kentucky lies east and in part south of the Southern Illinois group and just south of the Boonville group in Indiana.

In the fixing and adjustment of rates on coal and building of coal rate structures, a pronounced characteristic has been the establishment of "group rates" whereby all mines within a particular area—often large in extent—are accorded the same rates to the same consuming destinations. While, due to differences in location in an origin area, such grouping of mines for rate purposes at times entails a considerable disregard of comparative distances, its justification is, similarly

as in cases of other groupings applying to "areas containing natural resources," that it operates to encourage competitive production,[1] thus stimulating a more even development of the area and fuller production, all in the interest of consumers,[2] the traffic of the railroads[3] and of the producers in an origin group area generally.[4] Along with the group method of making rates, another marked characteristic of coal rate structures has been that of rate differentials, that is, differences in the rates applying from the respective origin groups in the adjustment. These differentials are usually constructed with reference to a particular base group.[5]

As involved in the Commission's "interstate rate proceeding", I. & S. No. 5139,[6] the origin mine groups are, as far as requiring specific men-

[1] *In re Transportation of Wool, etc.*, 23 I. C. C. 151, 164; *Waukesha Lime & Stone Co.* v. *C., M. & St. P. Ry.*, 26 I. C. C. 515, 518; *Idaho Comm.* v. *O. S. L. R. R.*, 33 I. C. C. 103, 106.

[2] *Lumber Co.* v. *St. L. I. M. Ry.*, 33 I. C. C. 33, 37; *Hitchman Coal & Coke Co.*, v. *B. & O. R. R.*, 16 I. C. C. 512, 520; *Southwestern Coal Asso.* v. *A. W. Ry.*, 89 I. C. C. 73, 85.

[3] *Chemical Lime Co.* v. *Bellefonte Cent. R. R. et al.*, 136 I. C. C. 333, 341.

[4] *New York Harbor Case*, 47 I. C. C. 643, 712; cf. generally *Illinois Commerce Comm.* v. *United States*, 292 U. S. 474, 486, and cases cited.

[5] Cf. *Ohio* v. *United States*, 292 U. S. 498, 502.

[6] Although the I. & S. proceeding and the intrastate proceeding, No. 28881, are dealt with and decided under separate headings in the report, the issues in the two proceedings are so closely related that the discussion of rates and differentials is necessarily overlapping.

tion, the groups above referred to in Indiana, Illinois, and western Kentucky and the destinations of the traffic are Rockford, Freeport, Dixon, and other points in northern Illinois and Beloit, Wisconsin, about 18 miles north of Rockford. The Brazil is the base group in Indiana on coal traffic to those destinations and to points in the north and northwest generally. From the other Indiana groups the rates, expressed in cents per net ton, are made certain differentials higher than those from the Brazil group. In Illinois, the Springfield group is the largest in area and the southern Illinois group the largest in production. Formerly the latter was regarded as the base Illinois group, but, in recent decisions, the Commission has used the Fulton-Peoria group, which lies in northwestern Illinois and has materially increased its production, as the base group from Illinois mines to all points in Iowa and to certain points in southern Wisconsin (R. 170). To destinations in the north and northwest, the rates from the Fulton-Peoria group in Illinois are generally 30 or 35 cents under those from the Springfield group and 60 or 70 cents under those from the southern Illinois group "with varying differentials between the other Illinois groups" (R. 170). "Rates from the respective Indiana groups [Brazil, Linton, Princeton, and Boonville groups] 30, 20, 13, and 10 cents under southern Illinois to the Northwest, that is, northeastern

Iowa, southeastern Minnesota, and southern Wisconsin, including Beloit, were approved in 1934 in *Illinois Coal Traffic Bureau* v. *Ahnapee & W. Ry. Co.*, 204 I. C. C. 225, and those differences, referred to by the Indiana shippers as the standard differentials, still prevail to practically all of that area" (R. 170).

For some years prior to 1930, the differences, or differentials, in rates from the several Indiana groups under those from southern Illinois which, as above stated, were approved by the Commission, and still apply, on traffic to destinations in the regions specified, including Beloit, Wisconsin, applied also on traffic to most of the northern Illinois destinations (R. 176). This, however, was not true as to the particular destinations of Rockford, Freeport and Dixon, the principal coal consuming points in the northern Illinois destination territory involved. In the adjustments of rates to those destinations prior to 1930 as well as subsequently, no settled differentials had been observed. Taking Rockford as illustrative, during a 15-year period prior to 1925, the group differentials were frequently changed and in no case corresponding to the so-called standard differentials; and in July of that year, as the result of an adjustment by the railroads the rates to that detination from the repective Indiana groups (Brazil, Linton, Princeton and Boonville) were made 30, 25, 18, and 15 cents under the

rates from the southern Illinois group to the same point. In 1930, the Illinois Commission ordered reductions in the intrastate rates on coal to the destinations above named and certain others in Northern Illinois, including a reduction from the southern Illinois group to Rockford of 17 cents. As a result of the latter reduction on traffic to Rockford the differences in the rates from the three most northern Indiana groups under those from the southern Illinois group were changed to 13 cents from Brazil, 8 cents from Linton, and 1 cent from Princeton, and the rates from the Boonville group became 2 cents over those from the southern Illinois group. (R. 176.)

In addition to effecting the changes above indicated in the rate relations of the Indiana and Illinois mine groups as origin groups producing and shipping coal to Rockford and the other destinations, the State Commission's order brought about substantial changes in the rate relations of Rockford and the other northern Illinois points, on the one hand, and Beloit, Wis., on the other, as consignee and consumer destinations of the traffic. Again taking Rockford as illustrative, under the State Commission's order, the rate from the southern Illinois group to that destination was reduced "from $2.17 to $2.00, or 75 cents less than the rate from the same group to Beloit, 18 miles north of Rockford, and the rate from

the Fulton-Peoria group to Rockford became 42 cents less than that to Beloit" (R. 167).

Following the reduction in intrastate rates pursuant to the Illinois Commission's order, the Interstate Commission, on petition of railroads operating in Illinois, instituted, under section 13 (3) and (4) of the Act, an investigation of the lawfulness of the intrastate rates so reduced and established. In its report in that proceeding, *Intrastate Rates on Bituminous Coal in Illinois,* 182 I. C. C. 537, the Commission, in dealing with the rates from the Illinois groups to the northern Illinois destinations, found (p. 549) that they were "well below the reasonable level of rates in this territory," but since it considered that the interstate rates from the Indiana groups to the same destinations were also below that level, it declined to order an increase in the Illinois intrastate rates unless and until the interstate rates from Indiana were raised to a level more nearly commensurate with the general level of rates in the territory (R. 168, 176).

Subsequently, in a complaint case involving the rates from Indiana, Illinois and western Kentucky to Beloit, Wis. (just north of Rockford), Division 2 of the Commission found that the rates were not unreasonable, that is, not excessive, but that they were unduly prejudicial to Beloit and preferential of Rockford to the extent they exceeded the rates from the same origins to Rockford by more than

25 cents. *Fairbanks-Morse & Co.* v. *Alton & S. R.*, 195 I. C. C. 365 (R. 167). The accompanying order for removal of the discrimination permitted compliance by the railroads, not only by reducing the rates to Beloit, but by the alternative method of increasing the rates from the same origins to Rockford; and, judged by the Commission's findings in *Intrastate Rates on Bituminous Coal, supra,* the latter rates were at a level well warranting an increase. However, the rates from the Illinois groups to Rockford—the intrastate rates—could not be increased because they had been prescribed as maxima by the Illinois Commission; and, to have increased the rates from the Indiana groups to Rockford without similar increases from Illinois, would have been unwarranted. Accordingly, compliance was made with the order by reducing the rates to Beloit (R. 168). On further hearing, 251 I. C. C. 181, the Commission affirmed generally its findings that the rates involved were unduly prejudicial to Beloit and preferential of Rockford but it changed the relation prescribed from 25 to 15 cents, by finding that the discrimination shown existed to the extent that the rates to Beloit exceeded the Rockford rates by more than 15 cents (R. 168).

The Commission proceeding herein involved, I. & S. No. 5139, had its inception in the above findings and accompanying order on rehearing in the *Fairbanks-Morse case, supra.* Since the rail-

roads had, as above stated, complied with the first order in the case by a reduction in the rates to Beloit, and one observing the 25-cent relation, and, since they considered that the rates, as generally involved, that is, the rates, not only to Beloit, but to Rockford and nearby related destinations in northern Illinois, were all at a level considerably below the general level of rates in the territory, their schedules, filed and suspended in I. & S. No. 5139, proposed increases generally in the rates to those destinations which, while conforming to the 15-cent relation prescribed, would at the same time place the rates as a whole on a level more nearly commensurate with the general level of interstate rates in midwestern territory. (R. 168, 175.) [7]

[7] In a proceeding decided shortly before its decision on rehearing in the *Fairbanks-Morse case*, *supra*, the Commission approved increases in the rates on coal from Indiana and western Kentucky to the northern Illinois points which, with certain exceptions, were substantially the same as the rate increases proposed in I. & S. No. 5139. *Coal to Illinois and Wisconsin*, 232 I. C. C. 151. A similar revision was proposed by the railroads at that time in the intrastate rates from the Illinois groups to northern Illinois destinations, which, however, was found unjustified by the Illinois Commission. Because of the maladjustment that would result, the railroads were unwilling to make effective the interstate rates proposed and approved without making effective the revision in intrastate rates proposed, and, accordingly, they petitioned the Interstate Commission to enter upon an investigation under section 13 (4) of the Act of the lawfulness of the intrastate rates from the Illinois origins to the northern Illinois destinations. The

The rate increases proposed ranged in amounts from 5 to 17 cents from the Indiana groups and approximately the same from the Illinois groups[8] to Rockford and the other destinations in northern Illinois. To Beloit, Wis., no increase was proposed in the rates from mines on the Milwaukee and certain other carriers serving the Indiana groups. With that exception the rates to Beloit from the Indiana mines were proposed to be increased by 17 cents from the Brazil group and 12 cents from the Linton and Princeton groups. No change was proposed in the rates from the Illinois groups to Beloit.[9] (R. 171.) The rate revision proposed by the railroads was, however, "greatly complicated by the insistence of the Milwaukee upon a so-called dual basis of rates from the Brazil and Linton groups, which under the proposal would be extended also to the Princeton group on traffic to Beloit" (R. 170).

Commission instituted the investigation, but later, upon request of the railroads, discontinued the proceeding and, by special permission, authorized cancellation of the schedules proposed in *Coal to Illinois and Wisconsin*, *supra*.

[8] Increases in the Illinois intrastate rates to a level commensurate with the reasonable interstate level in midwestern territory were sought and authorized (R. 198) in No. 28881, together with I. & S. 5139, and decided in the same report.

[9] In Appendix A to the Commission's report (R. 213), the existing and proposed rates from the Indiana and Illinois groups to Beloit and 12 representative destinations in northern Illinois are shown together with the rates to most of those points approved in *Coal to Illinois and Wisconsin*, *supra*.

Following the 1930 reduction in Illinois intrastate rates and the railroads' failure, in *Intrastate Rates on Bituminous Coal, supra,* to bring about the reestablishment of the former intrastate rates on coal to the Northern Illinois destinations, the Milwaukee, which serves only the Brazil and Linton groups and only certain mines in those groups, proposed to reduce by 17 cents its single-line rates from those mines to Rockford and Freeport and certain intermediate points in northern Illinois. The Commission, in *Coal from Indiana and Illinois,* 197 I. C. C. 245, 200 I. C. C. 609, found the proposed adjustment unjustified and ordered its cancellation. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U. S. 499, this Court held that the order was invalid for the reason, *inter alia,* that it was not supported by adequate findings; and the proposed rates became effective in 1934. (R. 177.)

In 1936 the Milwaukee increased its single-line rates from the Linton group to Rockford and Freeport by 5 cents, so as to make the differential Linton over Brazil on its line 10 cents. Subsequently, the Illinois Central met the Milwaukee's action by making like reductions in its single-line rates from the mines on its line in the Linton group to Rockford, Freeport and other destinations in northern Illinois. (R. 177.) Of the 30 mines comprising the Brazil group 4 are on the

line of the Milwaukee, and of the 31 mines comprising the Linton group 9 are on the line of the Milwaukee and 4 on the line of the Illinois Central. But, while these two railroads do not, as origin carriers, serve the other mines in the Brazil and Linton groups, in connection with such of the traffic from those mines as moves to the consuming area here involved, they figure importantly as destination carriers and as parties to many joint rates (R. 180, 181). Nevertheless, the reductions made by the Milwaukee and Illinois Central in the rates applying from mines on their lines were not accorded to the other mines in the two groups but, on the contrary, the rates from the latter to the destinations in northern Illinois were continued and maintained at the much higher level.[10] And, since the rate increases to those destinations, proposed by the tariff schedules before the Commission in I. & S. No. 5139, were generally the same in amounts from all of the mines in the two groups, including those on the lines of the Milwaukee and Illinois Central, the dual basis of rates, as then in effect, was, by such schedules, proposed to be continued (R. 182).

To Beloit, Wis., the existing rates from all the mines in the Brazil and Linton groups were the

[10] Except that from certain mines in the Brazil and Linton groups to a few destinations in northern Illinois the rates were still higher than the group rates. This was also true of certain mines in the Princeton group. In those instances the proposed rates were also higher than the group rates tion. (R. 182.)

same, but by the tariff schedules before the Commission in I. & S. No. 5139, the proposed dual basis of rates to Rockford and the other northern Illinois destinations reached by the Milwaukee was proposed to be extended to Beloit also. Since in connection with the rate increases proposed it was necessary to observe the 15-cent maximum spread, or relation, Beloit over Rockford, prescribed in the *Fairbanks-Morse* case, *supra,* the schedules of proposed rates were adjusted so as in all cases to conform to that requirement. But, while, on the one hand, the adjustment as worked out for the Brazil and Linton groups, as such, resulted in substantial increases in the group rates [11]

[11] In distinguishing the group rates from the rates applying from mines on the Milwaukee or Illinois Central and over their respective lines to destinations, the Commission's report (R. 177) refers to the former as joint-line rates and to the latter as single-line rates. Seven railroads serve the Brazil group and six serve the Linton group, but of those originating carriers, none, except the Milwaukee and Illinois Central, reaches with its own lines Rockford or other of the northern Illinois destinations, and none, except the Milwaukee, reaches Beloit. Consequently, save for the rates over the single-line routes of the Milwaukee and Illinois Central (which latter serves the Linton group only) the rates from the two mine groups were rates over joint-line routes. Of the 12 representative destinations in northern Illinois, the Milwaukee reached 5 and the Illinois Central 4 and those carriers were parties to the said joint-line routes and rates, existing and proposed, to the destinations on their respective lines. From the mines in the groups other than those from which its single-line rates apply to Beloit, the Milwaukee was party to the joint-line routes and rates, existing and proposed, to that destination. (R. 180, 181.)

to Beloit as well as those to Rockford, on the other hand, in the case of the Milwaukee's single-line rates from the Brazil and Linton mines on its line, the requirement of observing the 15-cent relation was met by a proposal to increase by 15 cents the rates to Rockford without any increase in the rates to Beloit. Under the Milwaukee's existing adjustment of single-line rates from the latter mines, the rates to Rockford, as reduced by that carrier below the group rates, were 30 cents lower than its rates to Beloit, and, accordingly, since its proposal was to increase the Rockford rates by 15 cents only; this permitted no increase in the Beloit rates if the 15-cent maximum spread, Beloit over Rockford, was to be observed. (R. 177, 181.) The net result, however, was that it was proposed to accord the Brazil and Linton mines on the line of the Milwaukee rates lower to Beloit by 17 and 12 cents, respectively, than accorded to the other mines in the two groups (R. 180, 181).

By the tariff schedules before the Commission, it was also proposed to establish a dual basis of rates to Beloit from the Princeton group. The group rate to Beloit was to be increased 12 cents but with the exception that from mines on the Southern and the Algers, Winslow & Western no increase was to be made. As for the Boonville group, which was served by the Southern only and which the Commission concluded should be com-

bined with the Princeton group (R. 171, 178), no increase in the rates from the mines therein to Beloit was proposed (R. 171).

After setting out in its report the facts in respect of the railroads' proposal to continue the dual basis of rates from the Brazil and Linton groups to northern Illinois destinations and to extend such basis also to the rates applying to Beloit, Wis., not only from those two groups but from all Indiana groups, the Commission discussed the evidence bearing on the propriety of the proposal and found, among other things, that there was no warrant therefor either as based on differences in distances or in transportation (R. 183); that the respondents appeared to be agreed that, given a fair relation between the respective origin groups, a single rate group basis was much to be preferred to any multiple basis; that "normally, coal sales turn on a price difference of as little as a few cents a ton"; and that plainly, therefore, only by the "maintenance of a single rate basis from each of these coal-rate districts can unjust discrimination and undue prejudice be avoided" (R. 183).

Proceeding to the question of the fairness and reasonableness of the rate relations between the respective origin groups that would be established under the revision of rates proposed, the Commission first found that the operating conditions from the respective Indiana and Illinois groups to the

northern Illinois destinations were in general substantially similar (R. 185), and, thereafter, it gave consideration to statistics of record showing the tonnages produced and moved from the respective mine groups during the years 1923 and 1936 (generally regarded as approximating normal) as compared with those during the year 1941, the latter period being the latest for which fairly complete tonnage results were of record. The statistics also made like comparisons with respect to the Illinois and Indiana mines as a whole. Generally stated, it appeared that to Beloit and the principal coal consuming destinations in northern Illinois, the shipments from the Indiana mines in 1941 showed an increase over the year 1936 considerably greater than that shown for the Illinois mines. In the matter of maintaining the total of all tonnage produced and shipped at or near the level of former years, the showing for the Indiana mines was also more favorable. But, while this was true for the Indiana mines as a whole, the total tonnage shipped from the Brazil group showed a sharp decrease. The Linton group had, in comparison with Brazil and also with the Springfield and southern Illinois groups, maintained its tonnage produced and shipped at a quite high level. The Princeton group had considerably increased its total tonnage of coal produced and shipped. (R. 185–187.)

Based in part on the statistics of production and tonnage shipped and in part on a comparison of the average distances and average rates from Brazil, on the one hand, and Linton, on the other, to Beloit and to the 12 representative northern Illinois destinations, the Commission concluded that the rate differential, Brazil under Linton, existing and proposed, was too small and should be increased to 10 cents. Thereafter, the Commission said (R. 187):

> If the proposed rates from the Indiana groups which are higher than the so-called normal basis [12] were reduced to the latter basis, and if the single-line rates of the Milwaukee and the Illinois Central from the Linton district were increased to the normal basis proposed from the other mines in that group, the rates from all of the Brazil mines made 10 cents less [than from Linton], and the Princeton-Boonville rates made 7 cents more, the resulting rates to the 12 destinations would average $1.95 from Brazil, $2.05 from Linton, and $2.12 from Princeton-Boonville. Such rates, referred to hereinafter as approved rates, compare favorably with the proposed rates from the Illinois groups to the same destinations, with the exception of certain of

[12] From certain mines in the Indiana groups to a few destinations in Northern Illinois the rates were higher than the group rates. In those few instances the proposed rates were also higher than the group rates proposed (R. 182).

> the rates from the Fulton-Peoria, Danville, and Du Quoin groups.[13]

In addition to the support afforded by the statistics of production and tonnage shipped from the respective mine groups and the reasons it gave for increasing to 10 cents the differential between the Brazil *base group* and the Linton group, the Commission, in determining upon the "approved rates" to the 12 representative northern Illinois destinations, applied, as tests of their justness and reasonableness, the distance scales of rates known as the Indiana-Illinois scale and the Midland scale,[14] already described in its report and approved for use in the proceeding (R. 172). The Commission's application of the distance scales to the approved rate from Brazil is generally illustrative of the use made of the scales. In connection therewith it said (R. 189):

> The average approved rate of $1.95 from Brazil to the 12 destinations for 256 miles is 88.6 percent of the Indiana-Illinois scale and 76.5 percent of the Midland scale,

[13] Certain of the proposed intrastate rates from mines in the Fulton-Peoria, Danville, and Du Quoin groups in Illinois were badly aligned. To correct those situations the Commission prescribed the adjustments that would result in lawful rates under section 13 (4) of the Act. In the cases of the Danville and Du Quoin groups, the adjustments found necessary resulted in the prescription of the group rates to apply therefrom. (R. 188, 189.)

[14] The distance scales are set out in Appendix C to the report. (R. 219.)

which compares favorably with the foregoing average approved rate from the Danville group, with the average proposed rate of $1.83 to the same destinations from Springfield for 225 miles, 91.5 and 75.6 percent of the respective scales, and with the average proposed base rate of $1.59 from Fulton-Peoria for 159 miles, 93.5 and 84.6 percent of the scales. The average rate of $2.12 approved from the Princeton-Boonville group for 366 miles is 83.5 and 67.9 percent of the respective scales, as compared with an average proposed rate of $2.14 for 354 miles from southern Illinois, 84.3 and 68.6 percent of the scales.

Applying the test of the distance scales to the approved rates from the Indiana-Illinois mines as a whole, the Commission said (R. 191):

> Taken as a whole, the combined rates herein approved from Indiana to the 12 northern Illinois destinations average 86.1 percent of the Indiana-Illinois scale and 70.7 percent of the Midland scale and the combined rates herein approved from the Illinois groups to those destinations average 85.4 and 70.3 percent of those scales. We believe that the rates or rate bases above indicated, which are set forth more specifically in appendices A and D hereto, will afford fair and reasonable relations of rates to northern Illinois destinations, both as between the respective

origin groups and as between the Indiana groups on the one hand, and the Illinois groups on the other.

In connection with its determination and approval of rates from the Indiana groups to Beloit, Wis., the Commission made the same application and use of the distance scales as tests of the justness and reasonableness of the rates approved (R. 193). While the approved rates to Beloit were on a somewhat higher level than those approved to northern Illinois destinations, they conformed to (R. 192) the 15-cent maximum spread, Beloit over Rockford, above referred to, and, moreover, Beloit was somewhat more distant and was a marginal point, that is, "located at the edge of a territory which, because of less favorable transportation conditions, properly takes somewhat higher rates than does northern Illinois" (R. 97).

In passing upon the proposed rates from the Western Kentucky group to the 12 representative destinations in northern Illinois, the Commission found that, to 6 of the destinations the rates proposed were unjustified. The 6 destinations were points intermediate to Chicago and the rates thereto were to be increased to the Chicago basis of $2.40. Such basis would have made the western Kentucky rates to the 6 destinations 35 cents over the southern Illinois rates to the same points, whereas the Commission concluded that

the differential should not exceed 25 cents. The proposed rates to the other Illinois destinations were found justified (R. 195–196).

As above stated, the Commission's order in No. 28881, *Bituminous Coal Rates Within Illinois,* although not under attack, is closely related to the order in I. & S. No. 5139. Broadly described, the relief sought by the railroads in that proceeding and granted by the Commission was an authorization of increases in the Illinois intrastate rates involved in the adjustment to a level more nearly commensurate with the maximum interstate level approved by the Commission as reasonable for midwestern territory (R. 198). The intrastate rates were assailed as discriminatorily low and unlawful, not as related to the interstate rates from Indiana (which were also relatively low), but as related to the interstate rates in effect from the Illinois origins to destinations in eastern Iowa and southern Wisconsin (R. 203). The Commission found substantially that the Illinois intrastate rates caused undue and unjust discrimination against interstate commerce and that the unlawfulness should be removed by increasing the rates to the approved bases indicated in the report, including appendixes A and D (R. 211).

Near the end of its report the Commission summarized its findings of fact (R. 205) and thereafter set forth its conclusions (R. 210), the first

3 of which, it is believed, contain all that is essential for present purposes. These were that

1. The present and the proposed rates from Indiana to the northern Illinois destinations, as published in the tariffs enumerated in appendix E to this report, result or would result in unjust discrimination as between shippers and receivers of coal transported in whole or in part by the Milwaukee or the Illinois Central railroads; in violation of section 2 of the act and in undue preference and prejudice as between the origins in the Brazil and Linton districts, and as between the respective Indiana districts, in violation of section 3 (1) of the act, in and to the extent that such rates reflect or would reflect rate relations between such districts and between the points in each of those districts to the respective destinations which differ from the relations reflected by the rates and the rate bases set forth as approved in this report, including appendices A and D hereto.

2. The proposed rates from the Brazil, Linton, and Princeton districts in Indiana to Beloit, as published in tariffs named in appendix E, would result in unjust discrimination as between shippers and receivers of coal transported in whole or in part by the Milwaukee, in violation of section 2 of the act, and in undue preference and prejudice as between (a) the origins in the respective Brazil and Linton districts, (b) the respective Indiana districts,

and (c) the Indiana districts on the one hand, and the Illinois districts on the other, in violations of section 3 (1) of the act, in and to the extent that such rates would reflect rate relations between such districts and the respective points in each of such districts to Beloit, which differ from the relations reflected by the rates set forth as approved in appendices A and D to this report.

3. The proposed rates from the Indiana districts to the northern Illinois destinations and to Beloit would be unreasonable to the extent that they would exceed the rates or rate bases set forth in the column headed "Rate approved in this proceeding" in appendix A to this report.

Following the issuance and entry by the Commission of its report and orders of July 9, 1945, petitions for reopening, rehearing, and reconsideration were filed by the Milwaukee, the Coal Trade Association of Indiana, and certain other parties (R. 126). These petitions were denied by the Commission, November 13, 1945.

PROCEEDINGS IN THE LOWER COURT

The complaint of the Ayrshire Collieries Corporation et al. was filed December 21, 1945 (R. 1), and that of the Milwaukee December 27, 1945 (R. 41). Answers were filed by the United States, by the Commission as intervener, by various intervening railroads and by intervening Illinois

coal traffic bureaus and interests (R. 55). By order of the court the complaints were consolidated for all purposes (R. 54) and, on April 22, 1946, the consolidated causes were heard before the specially constituted court of three judges, consisting of Circuit Judges Evans and Major, and District Judge Igoe (R. 52). On June 5, 1946, the Court filed and entered its findings of fact, conclusions of law, and judgment, sustaining the Commission's order as in all respects lawful and valid and dismissing the complaints (R. 108, 111). Due to the illness of Judge Evans, which occurred after the hearing, the court's decision was rendered, and the findings, conclusions, and judgment signed by Judges Mayor and Igoe (R. 108).

SUMMARY OF ARGUMENT

I

The determination of the causes by a majority of the three-judge court did not offend against the requirements of the Urgent Deficiencies Act, 38 Stat. 208, 220, 28 U. S. C. 47, 47a. While there is the provision that the application for the injunction shall be heard and determined by three judges, one of whom shall be a circuit judge, the statute expressly provides for a majority determination. Here the illness of Judge Evans supervening between the hearing of the causes and the decision by the other two judges did not defeat the requirement of a circuit judge's participation

in the decision since Circuit Judge Major and District Judge Igoe concurred in the final decision. To import into the general language of the statute a prohibition in all circumstances against a determination by two judges acting alone would militate against the statute's purpose of expediting in the public interest the final determination of the causes for which it provides special court review. In this case expedition would be defeated if it should have to be re-submitted on final hearing to a three-judge court.

From the practical standpoint the need for a narrow, restrictive construction is not apparent. In hearings on applications for restraining orders or interlocutory injunctions the required statutory notice is short and the applications are promptly disposed of, whereas the determining of causes on final hearing where the record is large ordinarily requires a considerable period of time.

II

In a proceeding under section 15 (7) of the Act the Commission is empowered to "make such order with reference thereto [proposed new rate] as would be proper in a proceeding initiated after it had become effective." Section 15 (1) provides that where the Commission, after hearing, shall be of opinion that any rate is in violation of any of the provisions of the Act, it is

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authorized to prescribe what will be the lawful rate, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist. *Akron, C. & Y. Ry. Co.* v. *United States,* 22 F. (2d) 199, 203 (W. D. N. Y.)

The construction given section 15 (7) from the beginning established as entirely within the Commission's authority its findings in the instant case that the present as well as the proposed rates were unlawful and its order prescribing the rates to cure the unlawfulness. *Advances in Rates-Western Case,* 20 I. C. C. 307, 314; *Lignite Coal from North Dakota,* 126 I. C. C. 243, 244; *Sioux City Terminal Ry. Switching,* 241 I. C. C. 53, 73–74.

The appellants, in contrast to their contention here recognized throughout the Commission proceedings that the present rates were in issue. This is shown in the petition for suspension of the proposed rates filed by appellant Coal Trade Association of Indiana (R. 132) in the testimony of its witness Scott (R. 1060) and in its exceptions to the Examiner's proposed report (pp. 17, 111, 112).

Appellant, Ayrshire Collieries, in its contention that, since the Milwaukee had not proposed any change in its single-line rates from Brazil and Linton to Beloit, those rates were not in issue

and that the Commission had exceeded its authority in requiring that they be increased, is clearly wrong.

The Commission's order of investigation included the investigation of the lawfulness of all rates contained in the named tariffs which contained the very rates which appellants assert the Commission was without authority to deal with. Not only did the Milwaukee propose the republication of an existing single-line rate but by proposing higher joint-line rates to Beloit was proposing a new practice affecting rates to Beloit.

III

While appellants contend generally that the Commission's findings are unsupported by underlying findings and evidence, the principal basis for this contention by Ayrshire Collieries is that, in order to constitute a section 2 violation, it must appear that a different rate is exacted from one shipper than from another over the same line or route. And as to the section 3 violation the claim is made that the evidence must show specific injury.

The Commission's report finds that transportation conditions via single-line or joint-line routes do not differ materially and that under the circumstances an extensive showing of injury through loss of tonnage to particular shippers or

consumers by reason of discriminatory rates is not required. *United States* v. *Trucking Co.*, 310 U. S. 344.

As to the contention that there must be an identity of origins and routes before section 2 comes into play; the practice of grouping points of origin or destination, or both, has long been in existence and is embodied in many rate structures. Such contention would read that section out of the Act as to many situations to which it is obviously intended to apply. For a carrier to insist for the purposes of single-line rates that mines within one rate group are of distinct origins while treating all mines within the same group from which joint-line rates apply as being of the same origin is unreasonable and inconsistent.

The Commission did not exceed its authority in approving and prescribing the adjustment of rates to be established.

The contention that the Commission's order was beyond its authority because not affording the carriers alternative methods of removing the discrimination and because the Milwaukee, although having exclusive control of its single-line rates, did not, with like effectiveness, control the higher joint-line rates is unsound.

The Commission's order is not merely an order to desist from unjust discrimination. It is demonstrably an order under section 15 (1) determining and prescribing the just and reasonable fu-

ture rates. The present rates from the Illinois origin groups remain constant under the proposed tariffs. It follows that in order to maintain the required relationships between the rates from Indiana to Beloit and the rates from Illinois to Beloit, the prescribed rates from Indiana groups to Beloit must be put into effect. The latter, therefore, become rates prescribed under section 15. The same result obtains in the rates from Indiana to northern Illinois destinations under the order of the Commission in *Fairbanks-Morse Case, supra.*

Under this aspect *Texas & Pacific Ry. Co.* v. *United States,* 289 U. S. 627, has no application here. There the order was not made under section 15 (1) but under section 3 where an alternative method of removing the discrimination must be left to the carrier. But the opinion stated that this is not true of an order pursuant to section 15 (1). The distinction between a section 3 order and a section 15 (1) order was also recognized in *Youngstown Sheet & Tube Co.* v. *United States,* 295 U. S. 476.

It was not necessary to give validity to the Commission's action in this case that it find that the preferential rates were noncompensatory. Rates may lie within the zone of reasonableness and still result in undue prejudice and discrimination. *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671; Cf. *Scandrett* v. *United States,* 32 F. Supp. 995 (D. Oreg.), affirmed, 312 U. S. 661.

In any event in the present case, considering together the interstate and intrastate adjustments the existing interstate as well as the intrastate rates were burdensomely low.

ARGUMENT

I

THE DECISION OF THE DISTRICT COURT IS NOT RENDERED INVALID BECAUSE OF THE FACT THAT ONE OF THE THREE JUDGES WHO HEARD THE CAUSE WAS UNABLE, BECAUSE OF ILLNESS, TO PARTICIPATE IN THE FINAL DETERMINATION

Appellants' first contention is that the District Court's judgment is invalid because it was made by two of the three judges who heard the case, Judge Evans having become ill after the hearing (R. 108). Appellants contend that the case cannot be decided by a majority of the three judges who heard it, if for any reason the third judge is unable to participate in the final decision. The applicable provisions of the statute, 38 Stat. 220, are as follows:

> * * * No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the applica-

> tion for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. * * * *Provided,* That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, * * *.

In addition to the support given appellants' contention by the literal language of the statute, there is the undoubted policy of the statute that applications for injunctions restraining enforcement of orders of the Interstate Commerce Commission should receive the deliberation not of a single judge but of three judges. It requires no elaborate argument to show that a decision in which only two judges participate is not necessarily that which would have been reached had a third judge participated in the deliberations preceding the decision. Consequently, therefore, appellants' contentions in this regard cannot be dismissed as insubstantial.

On the other hand, there are in our judgment more cogent considerations pointing to an opposite construction. A basic purpose of the Urgent Deficiencies Act is to achieve expeditious disposition of applications to enjoin enforcement of Commission orders. If appellants' construction were accepted, the illness or disability of any one of the three participating judges prior to final decision would necessitate a completely new hearing. Cases arising under the Act are often complicated and difficult, requiring lengthy and extensive consideration. The present case is not unique in this regard. In our view, acceptance of appellants' construction would result in considerable waste of time and energy, and would thus defeat the purpose of the statute to dispose quickly of cases arising under it.

Moreover, the provision of the statute requiring that a three-judge district court be specially constituted to deal with cases of this sort was unquestionably patterned upon the composition of the circuit courts of appeals; and it is expressly provided by law that two judges constitute a quorum of a circuit court of appeals (28 U. S. C. 212). It would seem highly unlikely that Congress intended to impose a more rigid procedural limitation upon the three-judge district courts than upon the circuit courts of appeals. In addition, the Urgent Deficiencies Act expressly pro-

vides that a decision may be reached by a three-judge court if a "majority of said three judges" concur. The case having been duly heard by three judges, the decision concurred in by two of them would seem to be as conclusive when the third judge fails to because of illness as it would be if his failure to concur were the result of his dissenting views.[15]

Furthermore, a feature of the present case that must not be overlooked is that the decision of Judges Major and Igoe, alleged to be invalid, was one denying, after final hearing, a permanent injunction.[16] In *Stratton* v. *St. Louis S. W. Ry.*,

[15] In *State of Ohio et al.* v. *United States*, 6 F. Supp. 386 (S. D. Ohio) (affirmed, 292 U. S. 498), one of the judges died before the decision was rendered, but an opinion written by him was found among his papers and was published as the opinion of the court, concurred in by the two other judges. The opinion had been written pursuant to an arrangement had at a prior conference of the three judges (p. 390). A stay pending appeal was applied for and a new judge was assigned to constitute a court to hear and decide the application. In *Oregon-Washington R. & Nav. Co.* v. *United States*, 47 F. (2d) 250 (D. Oreg.) (affirmed, 288 U. S. 14), the statutory court was twice reconstituted before a decision was rendered and decree entered. Following the first hearing one of the judges died and another judge was assigned and a second hearing held. Following the second hearing another judge died and the court as constituted for the third and final hearing included only one member of the original court.

[16] The bills asked for interlocutory injunctions but the applications were not pressed. In response to requests, the Commission postponed the effective date of its order until July 23, 1946.

282 U. S. 10, this Court reviewed the provisions of section 266 of the Judicial Code and certain of its decisions interpreting and applying the section. It appears that, under the section as worded prior to 1925, a single judge heard a cause on final hearing and thus might have to reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction. To end this anomalous situation, an amendment was enacted in 1925 adding to the section the provision that "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court." This provision, however, left uncertain whether the phrase "such suit" was intended to refer only to a suit in which an interlocutory injunction was in fact sought or to a suit in which it might have been, but was not, applied for. Under the interpretations given the provision it is only in cases where interlocutory injunctions are sought and pressed that a three-judge court is required; in cases where such relief is not sought and pressed a single judge may hear and determine the case.

It is evident from the above that, so far as section 266 is concerned, the basic purpose of the three-judge court provisions is met by their operation in connection with interlocutory or other like injunctive orders. *Stratton* v. *St. Louis S. W.*

Ry., supra, p. 17. Under the Urgent Deficiencies Act, the causes, of course, require three-judge courts on final hearing as well as hearings on applications for interlocutory injunctions or restraining orders. However, under the latter Act, just as under Judicial Code section 266, the whole emphasis of the provisions safeguarding against the possibility of improvident action by a single judge is directed to the prevention of improvident issuance of interlocutory injunctions or restraining orders. So far as the decision on final hearing is concerned the Act provides simply: "and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply." [17]

[17] These words mean simply that the court shall consist of three judges, one of whom must be a circuit judge. Congress, when extending section 266 of the Judicial Code to apply on final hearing did so, as above shown, by the provision that "The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court." It is not wholly plain that even this provision precludes a decision by two judges acting alone. Moreover, the construction placed on the provision, that it applies only where an interlocutory injunction has been in fact sought and pressed, convincingly demonstrates that, in connection with a decision on final hearing, any need for a strict application of the three-judge requirement is absent.

II

THE COMMISSION'S ORDER WAS WITHIN ITS STATUTORY AUTHORITY

(1) THE COMMISSION'S AUTHORITY EXTENDED TO THE EXISTING RATES AND RELATIONSHIPS

As pointed out in the preliminary statement (pp. 14, *supra*), under the tariff schedules before the Commission in I. & S. No. 5139 the rate increases proposed from the Indiana groups to the northern Illinois destinations ranged in amounts from 5 to 15 cents. At the time, the Milwaukee and the Illinois Central were maintaining from the mines on their lines in the Linton group to Rockford and other of the northern Illinois destinations served by them single-line rates lower by 12 cents than the group rates applying from the other mines in the Linton group to the same destinations. From the mines on its line in the Brazil group, the Milwaukee was maintaining to Rockford and the other northern Illinois destinations served by it, single-line rates lower by 17 cents than the group rates applying from other mines in the Brazil group to the same destinations. Since the rate increases to the northern Illinois destinations proposed by the tariff schedules were generally the same in amounts from all of the mines in the two groups, including those on the lines of the Milwaukee and Illinois Central, the dual basis of rates, as then in effect, was, by such schedules, proposed to be con-

tinued. The Commission's conclusions and underlying findings condemned as unlawful such dual basis of rates both as maintained in the existing rate adjustment and as proposed to be continued (R. 183, 210–211). In determining the rates and relations that should be established from Indiana to the northern Illinois destinations, the Commission found that the single-line rates of the Milwaukee and the Illinois Central should be increased to the group, or "normal," basis proposed and, further, that the differential, Linton over Brazil, which in some instances was 5 cents and in others 10, should be stabilized at 10 cents, "the standard differential, in effect generally to the Northwest." (R. 187.) The differential, Princeton over Linton, as existing and as proposed, was 7 cents. The Commission, however, considered that the Boonville group should be merged with the Princeton group and accorded the same differential of 7 cents (R. 187). The only mine in the Boonville group continuing to produce coal in any substantial quantity was that of the Sunlight Coal located about 10 miles across country from a mine in the Princeton group producing coal from the same seam (R. 186, 208).

In its formal conclusions with respect to the rates from Indiana to the northern Illinois destinations, the Commission found that the *present* and the proposed rates result, or would result, in violations of sections 2 and 3 (1) of the Act.

(R. 210–211.) Similarly, the Commission's formal findings of fact are directed to the present, as well as the proposed, rates. (R. 208, 210.) By its order the Commission required the railroads to desist from the violations found and, in effect, to establish rates and rate relations on the bases approved in the report (R. 222).

In their bills and briefs, appellants contend that the Commission's report and order are invalid because assuming to determine the lawfulness of the *present* rates from Indiana to Illinois destinations and to require the railroads to establish rates designed to cure the unlawfulness of the *present* rates, an issue which, the appellants urge, was not before the Commission in the proceeding. That the appellants are clearly wrong is apparent.

Under the I. & S. provisions (sec. 15 (7)) of the Act, it is provided that whenever there shall be filed any schedule stating a new rate, or any new classification, or regulation or practice affecting any rate, the Commission shall have authority, either upon complaint or its own initiative, to enter upon a hearing concerning the lawfulness thereof; that, pending such hearing and the decision thereon, it may, upon filing and delivering to the carriers affected a written statement of its reasons for such suspension, from time to time suspend the operation of such schedule, but not for a period longer than seven months; and that "after full hearing, whether completed before or

after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission *may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.*" [Italics supplied.]

The paragraph of the Act specifying the kind of order the Commission can enter in a proceeding initiated after schedules become effective, is section 15 (1), which provides in part:

> That whenever, after full hearing, * * * the Commission shall be of opinion that any individual or joint rate, fare, or charge * * * or that any individual or joint classification, regulation, or practice * * * is or will be unjust or unreasonable *or unjustly discriminatory or unduly preferential or prejudicial,* or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist * * *.

In *Akron, C. & Y. Ry. Co.* v. *United States*, 22 F. (2d) 199 (W. D. N. Y.), it was said (p. 203):

> Section 15, par. 7, empowered the Commission to entertain proceeding No. 2440. After a full hearing, *the Commission may make such order with reference to the proposed new rate as would be proper in a proceeding initiated after it had become effective.* It was within the power of the Commission, if it found the rate attacked to be unreasonable, under section 15, par. 1, to require a reduction of that rate to a basis found to be reasonable. *Advances in Rates, Western Case*, 20 Interst. Com. Com'n R. 307. *It has power either to increase or decrease the then existing rates. Western Paper Makers' Chemical Co.* v. *U. S.*, 271 U. S. 268, 46 S. Ct. 500, 70 L. Ed. 941; *Mo. Pac. R. Co.* v. *Boone*, 270 U. S. 469, 46 S. Ct. 341, 70 L. Ed. 688; *Excelsior from St. Paul*, 36 Interst. Com. Com'n R. 349; *Naval Stores from Southern Points*, 87 Interst. Com. Com'n R. 740. [Italics supplied.]

In *Advances in Rates—Western Case*, 20 I. C. C. 307, 314, the Commission said:

> * * * The question before the Commission is that which would have arisen had these rates gone into effect and a formal complaint been made against them as unjust and unreasonable. We may establish the rates proposed as reasonable, one or all of them, or reduce the proposed rates. We may continue in effect the present lower

> rates, or we may reduce the existing rates. For "the Commission may make such order in reference to such rate * * * as would be proper in a proceeding initiated after the rate had become effective."

In *Lignite Coal from North Dakota,* 126 I. C. C. 243, 244, the Commission said:

> Respecting the jurisdictional question, the position is taken that, in an investigation and suspension proceeding, the only issue before us is as to the lawfulness of the suspended schedules; that we are called upon either to condemn or approve the schedules; that we have no authority to approve a basis intermediate between the existing rates and the basis sought to be made effective; and that as the proposed schedules were not approved, the finding that the present rates were too low was consequently "irrelevant," "gratuitous," and "not binding on anyone." But this view is wholly untenable and in conflict with specific provisions of the act and numerous decisions of the commission. See *Advances in Rates—Western Case,* 20 I. C. C. 307, at page 314; *Excelsior from St. Paul, Minn.,* 36 I. C. C. 349, at page 365; *Salt from Louisiana Mines to Chicago,* 69 I. C. C. 312, at page 313.

In *Sioux City Term. Ry. Switching,* 241 I. C. C. 53, 73–74, the Commission said:

> On brief, complainants question our authority to deal with this situation in these

proceedings. In an investigation and suspension proceeding we constantly take cognizance of violations of sections 1, 2, and 3 of the act, and there being placed before us the question of what rates, rules, regulations, or practices are lawful for the future, we may require changes in the existing rates, rules, regulations, and practices (*Lignite Coal from North Dakota,* 89 I. C. C. 726); and we have authority to make such order with reference to the matters under investigation as would be proper in a proceeding initiated after the proposed schedules go into effect (section 15 (7)).

* * * It is apparent that the unjust discrimination and undue prejudice can lawfully be corrected only by requiring respondent to decline further to extend free of charge facilities and services which under existing law it has no duty to furnish. An appropriate order to that end will be entered.

In short, the statute (Section 15 (7)) and the construction given it from the beginning (*Advances in Rates-Western Case, supra*) establish as entirely within its authority the Commission's findings in the instant case that the *present* as well as the proposed rates were unlawful and its order to desist from maintaining such rates. The appellants, in contrast to their contentions here, recognized throughout the Commission proceeding that the *present* rates were in issue and that a full hearing was accorded on that issue. For

example, in its protest or petition to the Commission asking for suspension of the proposed rate adjustment, appellant Coal Trade Association of Indiana advanced as its first ground, "1. Because the *present* rates are in excess of reasonable maximum rates, and the proposed rates would be unreasonable in violation of Section 1 of the Interstate Commerce Act" (R. 132). During the hearings the said appellant's witness Scott was asked as to "the position of the Indiana operators with respect to the proceeding in issue." In reply he testified in part R. 1060–1061:

> A. We filed a petition with the Commission seeking suspension of the rates from the Indiana mines to destinations in Northern Illinois and Beloit, Wisconsin. * * * Our position with respect to the rates to destinations in Northern Illinois is that *the present rates* on bituminous coal from Indiana mines are not less than reasonable maximum rates, but are *unreasonable and excessive* * * *. Furthermore, the *present* and proposed rates to these Northern Illinois destinations *subject the producers and shippers of coal from Indiana mines to an undue prejudice and accord the producers and shippers of coal from Illinois mines,* who ship in interstate and intrastate commerce within the State of Illinois, *an undue preference in violation of Sections 3 and 13 of the Act, and subject some producers and shippers of Indiana*

coal to an undue prejudice and accord other producers and shippers of Indiana coal an undue preference, in violation of section 3 of the Act.

* * * It is our position that under sections 3 and 13 of the Act, the Commission should *prescribe rates that will result in the restoration* of the standard differentials between the Illinois mines on the one hand and the Indiana mines on the other, and as between the Indiana mines themselves which standard differentials existed prior to 1930 to these Northern Illinois destinations, and which has existed and which exists today to the territories north, northwest, and west of the Northern Illinois destination territory.

Q. By whom were the exhibits which you will introduce in this proceeding compiled?

A. They were compiled by me, and under my direct supervision. [Italics supplied.]

Furthermore, in exceptions[18] to the Examiner's proposed report, appellant Coal Trade Association of Indiana said:

In these proceedings, under the issues involved in the Investigation and Suspension case and the 13th Section case, the present record is sufficient for the Com-

[18] Reference is made to these exceptions pursuant to agreement in the Stipulation As To The Record (R. 1700). The exceptions are not included in the printed transcript but appear as one of the documents included in plaintiffs' exhibit 3 filed at the hearing in the District Court and included in the record transmitted to this Court.

> mission to determine the propriety of the level of the rates from the mines in Illinois and Indiana to these destinations in northern Illinois and Beloit, and the differentials to apply as between the mine origin groups in said States in the movement of coal to such destinations [p. 17].

It was also urged in the exceptions that:

> The record shows the transportation conditions within Illinois and from Indiana to these destinations to be the same. There is no evidence omitted from this record which is necessary for a decision of these issues. Why postpone again to a future proceeding, whether by way of arbitration or by way of some hitherto unknown type of proceeding before this Commission, the question of the final disposition of the issue of the proper relationship and measure of the rates from these two competing sets of origin groups in Illinois and Indiana to this important destination territory? * * * We urge that the Commission exercise the jurisdiction conferred on it by the Act, and enter an order based on the facts, * * * and that there be no further postponement in making effective within this territory a rate adjustment that is fair and reasonable to all concerned, a rate adjustment that protects the interests of the consumer as well as the producers of coal in this territory [pp. 111–112].

It would appear from the above that the Coal

Trade Association of Indiana, the principal protestant, raised the issue of the lawfulness of the *present* rates and rate relations; that during the proceedings it made unmistakably plain that it had done so; that it in effect insisted that it was the Commission's duty to proceed and prescribe the fair and reasonable rates and rate relations; and that the evidence was ample for the purpose. As stated in *New York Cent. & H. R. R. Co.* v. *Int. Com. Comm.*, 168 Fed. 131, 139 (S. D. N. Y.), the Commission is an administrative tribunal dealing with practical problems. "Before we declare an order of the commission invalid as being outside the issues, we think that we should be satisfied that it is outside the issues actually presented to the commission and upon which the parties were heard."

(2) THE COMMISSION, IN DEALING WITH THE RATES TO BELOIT, ACTED WELL WITHIN ITS AUTHORITY

While, as to the northern Illinois destinations, the dual basis of rates from the Brazil and Linton groups which it was proposed to continue, already existed, this was not true of the rates to Beloit, these being the same in amounts from all mines in the respective groups including the mines on the line of the Milwaukee. Under the proposed schedules, however, a dual basis of rates to Beloit was to be established for, while the group rates as applying from all mines other than those on the Milwaukee were to be increased, no increase in the single-line rates of the Milwaukee

from the mines directly served by it was proposed. And similarly as to the proposed rates from the Princeton group, while the group rates as applying from all other mines was to be increased, no increase in the rates from the mines in that group on the Southern and Algers, Winslow and Western was proposed. The Southern was the only carrier serving the Boonville group and it proposed no increase in the rates to Beloit from that group (R. 178).

In its bill (R. 14–15) appellant Ayrshire Collieries contends substantially that, since the Milwaukee had not proposed any change in its single-line rates from Brazil and Linton to Beloit, those rates were not in issue and the Commission, therefore, had exceeded its authority in requiring that they be increased.[19] This contention is clearly wrong in all respects.

[19] Appellant makes the same contention as to the rates to Beloit from the mines in the Princeton and Boonville groups on the lines of the Southern and the Algers, Winslow and Western. Here the situation is different; for the Southern's tariff included in the Commission's order of investigation does not contain any rates from Princeton or Boonville to Beloit, and because of that the Commission made no findings or order as to such rates. The Commission's Conclusion No. 2 (R. 210–211), which deals with the rates to Beloit, relates only to the proposed rates from the Brazil, Linton and Princeton districts "as published in the tariffs enumerated in Appendix E" and, since such tariffs do not contain rates of the Southern Railway to Beloit, it is evident that the Commission made no findings or order with respects to such rates. This is further shown by the fact that Boonville is omitted from the Indiana districts named in Conclusion No. 2.

The Commission's order of investigation (R. 141–144) in I. & S. No. 5139 provides in part as follows:

> *It appearing,* That there have been filed with the Interstate Commerce Commission tariffs containing schedules * * * designated as follows:
>
> * * * * *
>
> Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Henry A. Scandrett, Walter J. Cummings, George J. Haight, Trustees.):
>
> Supplement No. 9 to I. C. C. No. B–7238;
>
> Supplements Nos. 27 and 28 to I. C. C. No. B–7246;
>
> Supplement No. 25 to I. C. C. No. B–7287;
>
> * * * * *
>
> *It is ordered,* That the Commission * * * enter upon a hearing concerning the lawfulness of the rates, charges, regulations and practices stated in the said schedules contained in said tariffs, viz:
>
> * * * * *
>
> And the rates, charges, regulations and practices stated in all schedules contained in each of the other said tariffs and supplements named in this order.

In short, the Commission's order of investigation provided for investigation of the lawfulness of all rates contained in the tariffs named in the order. Among the Milwaukee tariffs specifically

named is Supplement No. 27 to I. C. C. No. B-7246. Item 371 thereof states that the rate from Brazil-Clinton to Beloit via the single-line route of the Milwaukee shall be $2.10 and that the rate from Linton-Sullivan to Beloit via the single-line route of the Milwaukee shall be $2.30. Thus it is evident that the Milwaukee tariff under investigation contained the very rates which the appellants assert the Commission was without authority to deal with. Moreover, the Milwaukee, in proposing such single-line rates together with the higher joint-line rates to Beloit to which it was a party, was proposing a new practice affecting the rates to Beloit.

The Commission's authority under section 15 (7) taken together with its authority under section 15 (1) is well brought out in *Coal Rates from Oak Hills, Colo.*, 30 I. C. C. 505, in which the Commission said at p. 508:

> Under section 15, paragraph 1, of the act, the Commission, on its own initiative, whenever it is of the opinion that any rates demanded, charged, or collected are in any way unlawful, may enter upon an investigation, hold full hearings, and determine and prescribe just and reasonable rates. Where new rates are filed, the Commission, under section 15, paragraph 2 [now paragraph 7], is authorized by similar means to determine the propriety of such new rates and, pending such determination, to

suspend the operation of the schedules stating such new rates. In connection with the latter hearing the statute casts upon the carrier the burden of justifying any increased rates.

As has already been observed, the proposed rates include some increases over and some decreases under the present rates, *while in other cases the proposed rates are the same as the present.* The order herein shows plainly the intent of the Commission to enter upon a hearing concerning the propriety of the increases and the lawfulness of the rates under suspension, and provides that the operation of *all* schedules contained in the proposed tariff be suspended. Clearly, when the proposed rates involve increases or decreases they are new rates, and as to them the Commission's jurisdiction in this proceeding is full and complete by virtue of the second [now seventh] paragraph of section 15. *If the rates in which no change is proposed be not new rates, then they are necessarily rates "demanded, charged, or collected," and their investigation in this proceeding is proper under the first paragraph of section 15.* And certainly there can be no doubt under the second [seventh] paragraph of the Commission's power to suspend in its entirety the schedule stating these rates. [Italics supplied.]

That, entirely aside from the fact that the Commission's order of investigation specifically

covered the Milwaukee's existing single-line rates to Beloit, the appellants were fully apprized that the lawfulness thereof was under investigation has already been demonstrated by the excerpts from the testimony of their witness Scott and from the exceptions to the Examiner's report filed in the case. See *supra*, pp. 47–50.

III

THE COMMISSION'S ORDER IS SUPPORTED BY FULL FINDINGS, RATIONAL CONCLUSIONS AND AMPLE EVIDENCE

As pointed out both by the brief of the Ayrshire Collieries and that of the Milwaukee, the Commission, in condemning as unlawful the dual basis of rates, both as proposed to be continued from the Brazil and Linton groups to destinations in northern Illinois and as proposed to be extended to the adjustment of rates from those groups to Beloit, Wis., found such dual basis of rates unjustly discriminatory in violation of section 2 and unduly preferential and prejudicial in violation of section 3. While both briefs contend generally that this finding is unsupported by underlying findings and evidence, the brief of the Ayrshire Collieries (Chap. II) makes such contention separately as to the finding of unjust discrimination in violation of section 2. However, the brief later makes plain (p. 39) that the principal contention in chapter II is that, in order to constitute unjust discrimination violative of section 2, it must ap-

pear that a different rate is exacted from one shipper than another from the same origin over the same line or route. Appellant Ayrshire Collieries considers, apparently, that the fact that the Milwaukee is, for example, maintaining a low single-line rate from mines directly served by it while at the same time joining in a much higher joint-line rate from other mines in the same group to the same destinations does not meet the precise test of unjust discrimination under section 2. It makes certain other contentions, but the contention just mentioned is the principal distinction it emphasizes between the Commission's findings under section 2 and the findings made under section 3.

In chapter III of its brief, appellant Ayrshire Collieries deals with the Commission's findings condemning the dual basis of rates, existing and proposed, as unduly preferential and prejudicial in violation of section 3. There, too, the appellant contends that the Commission's findings are unsupported by underlying findings and evidence, but the chapter soon makes plain (p. 49) that what is referred to is absence of specific evidence of injury, such as evidence that "that any mine in the Brazil or Linton groups ever lost any business to a mine served by the Milwaukee" or was ever "prevented from securing an order for coal at any of these Illinois destinations by reason of the rates in effect from mines served by the Milwaukee."

From mines in the Linton group on their lines to destinations in northern Illinois served by them, the Milwaukee and Illinois Central were maintaining single-line rates much lower than the group rate in effect to the same destinations from other mines in the group. From mines in the Brazil group on its line to destinations in northern Illinois, the Milwaukee was maintaining single-line rates much lower than the group rate in effect to the same destinations from other mines in that group. By the schedules before the Commission it was proposed, not only to continue such dual basis of rates to the northern Illinois destinations, but also to inaugurate it into the adjustment of rates to Beloit. These facts found by the Commission are not questioned by the briefs of appellants; nor do they question, but instead set forth (Ayrshire Br., p. 34) the Commission's finding that a difference of a few cents per ton is normally sufficient to divert a coal contract from one mine to another [20] (R. 183, 206). However, appellants' briefs are not altogether clear as to the participation by the Milwaukee and Illinois Central in the group, or joint-line, rates from mines other than those on their lines. For example, the brief of the Ayrshire Collieries, after mentioning that the Milwaukee and Illinois Central participate in some of the tariff routes

[20] This is discussed in the *Fairbanks-Morse case*, 251 I. C. C. 181, 203.

from origins on other carriers over which the higher rates apply, says (p. 47):

> * * * The only other evidence was of the distances via shortest tariff routes from the origins, and the fact that, while the Pennsylvania Railroad published rates via short tariff routes in which the Milwaukee participated, no coal ever moved via such routes, and that any coal from origins on the Pennsylvania consigned to northern Illinois destinations was hauled to Chicago and there turned over to connections for the transportation to destination, which routes are 60 to 80 miles longer than the short tariff routes (R. 791–792).

By the above, the brief is referring to the testimony of a Milwaukee witness in answer to the question as to whether the Milwaukee received coal from other railroads that originated the coal in the Brazil and Linton groups. It is true that the witness said that he did not believe that the Milwaukee got any coal from the Pennsylvania, but his answer to the first question was (R. 791):

> A. Yes, we get some coal, but it is a small portion of the coal we handle.

Referring to the participation by the Milwaukee and Illinois Central in the joint-line rates from the Indiana groups, the Commission says in its report (R. 181–182):

> As stated, both the Milwaukee and the Illinois Central join in the so-called normal rates, by which is meant the rates main-

> tained or proposed by most of respondents, from mines in the Brazil or Linton districts to the same destinations to which they maintain their lower single-line rates. They also participate in the rates, all of which are joint-line, from the Princeton and Boonville groups to the same destinations.[21]

In the matter of comparative average distances over the single-line and joint-line routes, the Commission's report gives illustrations of such distances from the Brazil and Linton groups to the northern Illinois destinations, and to Beloit (R. 180–181). As to the distances from the Linton group, the report says, for example:

> From all the Linton mines the average distance to the 12 destinations is 293 miles. The present rates average $1.94 and those proposed $2.03. From the Linton points on the Milwaukee to the 5 representative destinations to which that respondent's

[21] Six railroads in all serve the Brazil and Linton groups (R. 180) but, of these, only the Milwaukee and the Illinois Central reach the northern Illinois destinations with their own lines. The Milwaukee and Illinois Central serve Freeport and Rockford and certain other of the northern Illinois destinations and, in addition, Freeport is served by the Chicago & Northwestern and Rockford by the Chicago & Northwestern and the Burlington. But these latter railroads do not originate coal from the Indiana groups. Of the six railroads serving the Brazil and Linton groups, the Milwaukee alone reaches Beloit. The only other railroad serving Beloit is the Chicago & Northwestern. Exhibit 3, sec. I, p. 1; sec. V, pp. 18, 19, 30. Apparently, the Burlington does not participate in the joint rates from the Indiana groups (R. 1611).

> single-line rates apply, the average distance is 278 miles, or 4 miles greater than the average of 274 miles to the same destinations from the 5 origins on the Chicago & Eastern Illinois in that district. From the Illinois Central points in this group to the 4 representative destinations to which it maintains single-line rates, the average distance is 317 miles, or 43 miles greater than over the routes of the Chicago & Eastern Illinois. * * *

The Commission found (R. 183) that "the transportation conditions over the single-line routes * * * do not differ materially from those over the joint-line routes to the same destinations from other mines in the same group" (R. 1612, see p. 49, *supra*); that "there is no important difference in the average distances over those respective routes"; that "normally, coal sales turn on a price difference of as little as a few cents a ton"; and that "plainly, therefore, only by the establishment and maintenance of a single-rate basis * * * can unjust discrimination and undue prejudice be avoided." It is believed that the Commission's conclusion here is entirely rational, and, as further said by the Commission (R. 183):

> Under the circumstances recited, an extensive showing of injury through the loss of tonnage to particular coal shippers or consumers by reason of discriminatory rates here before us is not required.

United States v. *Trucking Co.*, 310 U. S. 344.

After all the question of the *unjustness* or *undueness* of discrimination or prejudice is for the Commission. The statute does not specify that injury or damage must be shown with the same particularity as necessary to determine and fix reparation claims. The Milwaukee served but 4 of the 30 mines in the Brazil group and but 9 of the 31 mines in the Linton group and yet a witness for that railroad testified that, of the total tonnage moving from those groups to Rockford, the Milwaukee handled under its single-line rates 95.4 percent of that moving from Brazil and 78.5 percent of that from Linton. The witness further said that there was a movement from mines on other railroads taking the higher rates but that it was relatively small as compared with the movement under the single-line rates (R. 668). The natural significance of this testimony is that the lower rates played a considerable part in securing for the Milwaukee the large tonnage of coal moving over its single-line routes to Rockford, and the Commission's findings attach that significance to the evidence (R. 182–183; 206). However, the Milwaukee's brief (pp. 22–23) says that, in its petition for rehearing, it offered to show that, during the period prior to 1934 when the rates to Rockford from all mines in the Brazil and Linton groups were at the same level, it

handled from 60 to 99.07 percent of the tonnage moving to that destination; and it further says that the Commission, in refusing to reopen the case, denied it an opportunity to explain the only statement in the report "that can possibly be construed as supporting the finding that the condemned rates violated Section 3."

This assertion, it is apparent, is unwarranted. Conditions at the mines and at the consuming points presumably have not remained static, and, in any event, if the Milwaukee considered the evidence important, it had ample opportunity to introduce it before the hearings closed. The northern Illinois destinations and Beloit, Wis., afford natural markets for coal produced in the Indiana mine groups and, as found by the Commission, all the mines in the groups in general produce coal of the same quality and grade (R. 206). Differences in rates as great as 17 and 12 cents have their inescapable consequences. Even assuming that during some period prior to 1934 when the rates from all mines in the Brazil and Linton groups were the same the Milwaukee handled from 60 to 99 percent of all coal moving from those groups to Rockford, still it would not be illogical to conclude that the low single-line rates of the Milwaukee played a not inconsiderable part in the recent showing testified to by the Milwaukee's witness of a relatively very large tonnage moving under those rates as compared

with that moving under the higher group, or joint-line, rates. Certainly such differences in rates could reasonably be considered as having an important bearing on the future opportunities of shippers in the groups to market their coal in the destination territory. As in effect found by the Commission (R. 207, 208), with the dual basis of rates continued to northern Illinois and extended to Beloit, there could be no expectation of stabilizing the coal-rate adjustment upon a reasonable and nonprejudicial basis.

As above indicated, the brief of the Ayrshire Collieries, while not attacking the section 3 findings on that ground, in effect asserts that here there could be no unjust discrimination violative of section 2 because the Milwaukee's single-line rates apply from different mine origins than those to which the higher group, or joint-line, rates apply, and because the situation is not one of different rates applying over identical routes. As to the latter, it is seldom that, in the adjustment of rates between points of origin and destination, there are not a good many routes over which the rates apply. As to the point made that the mines within a group are not the same origin points, it seems evident that the Milwaukee cannot, for certain of its rates, treat the mines in a group as different origins and, at the same time, for other of its rates, treat such mines as one origin point. The Milwaukee, while insisting for

purposes of its single-line rates that the mines in the Brazil and Linton groups are distinct origin points, is, nevertheless, party to the group or joint-line, rates which treat all the mines in the respective groups as one origin. From mines on the lines of other railroads to the destinations in northern Illinois served by it and to Beloit, Wis., the Milwaukee is party to the group rates, and, from the mines on its own line to destinations in northern Illinois which it does not reach, the Milwaukee is also party to group rates. The practice of grouping points of origin or destination, or both, has been long in existence and is embodied in many rate structures. The Act's provisions, it is believed, are intended to be adaptable and given a practical application. Appellants' construction of section 2 would read that section out of the Act as to many situations to which it is obviously intended to apply.

In addition to their condemnation of the dual basis of rates, as existing and as proposed, the Commission's findings also applied to the differentials between the respective Indiana groups (R. 210–211). As above pointed out, the Commission, in determining the just and reasonable relations that should be maintained between those groups, found that the differential, Linton over Brazil, which in some instances was 5 cents and others 10, should be stabilized at 10 cents. This was the standard differential, in effect generally to the northwest

and the decline in volume of movement from the Brazil group had been much greater than that from the Linton group (R. 187). The differential, Princeton over Linton, as existing and as proposed, was 7 cents (the standard differential), except that as between Princeton, on the one hand, and Linton mines on the Milwaukee and Illinois Central, on the other, to Rockford and certain other destinations in northern Illinois, the rate difference was 19 cents. As above stated, the evidence showed and the Commission found (R. 183) that there was no material difference between the transportation conditions over the single-line routes of the Milwaukee and Illinois Central and those obtaining over the joint-line hauls. Speaking of this particular adjustment, the Commission said (182) that "between the Linton points on the Milwaukee or the Illinois Central and the Princeton mines the present and the proposed differential is and would be 19 cents instead of the usual 7 cents; and between those same Linton origins and the Boonville mines the difference reflected by the present and proposed rates is 22 cents, instead of the standard differential of 10 cents, or the differential herein approved of 7 cents. What has just been said would be true also under the proposed adjustment to Beloit." The Commission considered and found (R. 207) that the differential maintained by the two carriers was greater than warranted by the respective distances. The fair and reasonable differential between all mines

in the respective Linton and Princeton groups to all of these destinations was found by the Commission to be 7 cents (R. 187).

The Commission considered that the Boonville group should be merged with the Princeton group and accorded the same differential of 7 cents (R. 186). As to this the Commission found (R. 208):

> 13. The difference in the distances from the single important mine in the Boonville group and from nearby mines producing similar coal in the Princeton group to Beloit and the northern Illinois destinations is small. A merger of those two groups will increase the average distance from the Princeton district to the 12 representative northern Illinois destinations as well as to Beloit by only 8 miles. The movement from the Boonville group to this destination territory has been and is negligible, even though its customary differential over Princeton has been only 3 cents. Accordingly, the rates from the Boonville mines to these destinations should not exceed those from the Princeton district to the same destinations.

From the above it will be seen that, except for the fact that the Commission disapproved the advantage secured to the Milwaukee and Illinois Central by their comparatively low single-line rates and except for the Princeton-Boonville merger, the Commission's action in respect of the differentials between the Indiana groups was not materially dif-

ferent than what was proposed, including the proposal of the Milwaukee and Illinois Central through the medium of the group, or joint-line, rates in which they joined. The grievance especially asserted by appellants appears to relate to the differentials found by the Commission to be fair and reasonable as between the Indiana groups and certain Illinois groups, particularly Springfield.

As above shown, following the 1930 reduction in Illinois intrastate rates, required by the Illinois Commission, the Milwaukee established from mines on its line in the Brazil and Linton groups corresponding reductions in its single-line rates to Rockford and certain other northern Illinois destinations served by it. Subsequently, that carrier raised its single-line rates from the Linton group by 5 cents, so as to make the differential Linton over Brazil on its line 10 cents and, thereafter, the Illinois Central made like reductions in its single-line rates from mines on its line in the Linton group to northern Illinois destinations served by it (R. 177). The Milwaukee and Illinois Central single-line rates to Rockford and certain other northern Illinois destinations were thus established at a lower level than the group, or joint-line, rates from the Indiana groups and at a level for the most part meeting the reductions in the Illinois intrastate rates. And this relation was to be continued, since the proposed increases to northern Illinois were generally the same from all origins in the Illinois and Indiana

groups, including those on the Milwaukee and Illinois Central.

As stated, the grievance particularly asserted by appellants appears to relate to the differentials found fair and reasonable as between the Indiana groups and certain Illinois groups. While appellant Ayrshire Collieries contends that the Commission was without authority to eliminate the dual basis of rates, its brief refers (p. 49) to the testimony of an operator of coal mines who stated he thought one level of rates preferable but that that should be the level of the Milwaukee rates, which are properly related to the rates from the Illinois groups (R. 1466).

However, as above shown (p. 20–21), it appeared from exhibits of production and tonnage shipped that, to Beloit and the principal coal consuming destinations in northern Illinois, the shipments from the Indiana mines in 1941 showed an increase over the year 1936 considerably greater than that shown for the Illinois mines. Furthermore, the fact that the Milwaukee and Illinois Central had by their reductions in single-line rates from Indiana mines (made just prior to 1936, R. 177) met the reductions in Illinois intrastate rates previously made does not establish that such single-line rates are properly related to the rates from the Illinois groups. As found by the Commission (R. 176), while "for some years prior to 1930 the so-called standard differentials

applied to most of those northern Illinois destinations, there appears to have been then, as now, no fixed relation either between the Indiana groups or between those groups and southern Illinois or Springfield to Rockford, Freeport, and Dixon, the principal coal-consuming points in this destination territory." Moreover in 1925, the railroads "voluntarily reduced the rates from the respective Indiana groups to Rockford by 5, 6, 8 and 28 cents, and made no reductions in the rates from any of the Illinois groups" (R. 176). There followed in 1930 the order of the Illinois Commission requiring the reductions in Illinois intrastate rates, which reductions became effective in 1934 (R. 177).

The appellants' briefs set forth comparisons of rates and mileages to the northern Illinois destinations from the Indiana groups, on the one hand, and Southern Illinois and Springfield (particularly the latter), on the other hand, to the end, judged by their statements, of showing capriciousness and arbitrariness on the part of the Commission. But the comparisons do not compare like with like. They ignore the basic principles applied by the Commission. Early in its report the Commission said (R. 170):

> Illinois has eight coal-producing districts, of which Springfield in central Illinois has long been the largest in area and southern Illinois the largest in production. Up to

> recent years southern Illinois was regarded as the base Illinois group, but in the last decade the Fulton-Peoria group in northwestern Illinois has materially increased its production, and in *Midland Electric Coal Corp.* v. *Chicago & N. W. Ry. Co.*, 232 I. C. C. 5, and *Fairbanks-Morse & Co.* v. *Alton & S. R., supra,* that group was used as the base from Illinois mines to all points in Iowa and to certain points in southern Wisconsin.

In the comparisons later made in the report, Fulton-Peoria is used and frequently referred to as the base Illinois group. Appellants may not agree that the Commission was right in using Fulton-Peoria as the base. But generally, as in Indiana, the group nearer destination points is used. In Illinois, this has not been the case. For reasons stated by the Commission the northern Illinois group has not been used as the base (R. 184). Instead southern Illinois, a big producer, has been used and is still used to many destinations. Springfield, large in area but not so in production, has not been used as the base group in Illinois. So far as appears from their briefs, the appellants do not assert that it should be. For reasons given by the Commission, Fulton-Peoria, lying north of Springfield, has been of recent years used as the base to the destination territory specified by the Commission. In any comparisons of rates and mileages, using

Fulton-Peoria as the base, it will be found that a quite different picture is shown than appears from appellants' briefs. Moreover, even using Springfield for comparison, there is another picture than that afforded by appellants' comparisons.

Appellants point out that the rate approved by the Commission from the Brazil group to Rockford is $2.07 for 251 miles and that the approved rate from the Springfield group to Rockford is only $1.95 for 257 miles, and they say such an adjustment can not be sound. But many rates can be found in the adjustment approved by the Commission which reflect the reverse condition. Thus, to Forreston, Ill., an important destination, the distance is 36 miles greater from the Brazil group than from the Springfield group, but the approved Brazil rate is only 5 cents higher than that approved from Springfield, and to Sterling, Ill., another important destination, the distance is 103 miles greater from the Brazil group than from the Springfield group, but the approved rate is only 14 cents greater from Brazil than from Springfield. Under the so-called Indiana-Illinois distance scale of reasonable maximum rates for application from base groups to particular destinations in this general territory, set forth in Appendix C to the Commission's report and used by the Commission as one of the measurements to be considered in passing upon the lawfulness of these

rates, the Brazil rate to Sterling would be 40 cents higher than that from Springfield whereas, as pointed out, the approved spread is only 14 cents. To Dixon, Ill., the distances are 177 miles from the Springfield group and 257 miles from the Brazil group, a difference of 87 miles and to Rochelle, Ill., the distances are respectively 200 and 255 miles, a difference of 55 miles. Nevertheless, the Indiana operators insisted that the Commission prescribe the same rate from both origin groups to each of these destinations.

In order to show that comparisons based on distance alone are misleading, consideration should be given to some of the other rates in the adjustment approved by the Commission which viewed only from a distance standpoint result in rate relations favorable to Indiana. To Dixon, the approved rate from the southern Illinois group for 312 miles is $2.05 and that from the important Princeton-Boonville group in Indiana, for about 355 miles is $2.06, or a spread of only 1 cent for a difference in distance of 43 miles. To Sterling the approved rate is $2.05 for 329 miles, from the southern Illinois group and $2.06 for 379 miles from the Princeton-Boonville group or again, a spread of 1 cent for a difference in distance of 50 miles. A number of additional such illustrations can be found. These latter comparisons are with the more distant groups in each of the states

and are fair because both mine groups are in the same relative position in the respective states. That cannot be said of the comparisons between the Brazil and Springfield rates, for Brazil is a base group and Springfield a differential group, and the comparison therefore is improper and valueless because the groups are not in the same relative position in the rate adjustment. From Illinois, Fulton-Peoria is the base group and Springfield is uniformly related to the Fulton-Peoria group on the basis of a differential, usually 30 cents, which is on a substantially lower level than any of the base group rates in this adjustment. Obviously, therefore, any comparison between the Brazil and Springfield rates is of unlike things and must be evaluated accordingly.

Even though, based on recognized principles, a coal rate adjustment were 100 percent perfect, presumably, if those principles were ignored, seeming inconsistencies could be pointed out. Just as in cases of grain rates and other like adjustments, coal rate adjustments present complex and difficult problems. But it cannot be doubted that here the Commission proceeded in a rational manner and, in fact, prescribed an entirely fair and reasonable adjustment of rates. *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534; *Ohio* v. *United States*, 292 U. S. 498, 506, 511.

IV

THE COMMISSION DID NOT EXCEED ITS AUTHORITY IN APPROVING AND PRESCRIBING THE ADJUSTMENT OF RATES TO BE ESTABLISHED

Both the brief of the Ayrshire Collieries (pp. 55–60) and that of the Milwaukee (pp. 27–31) contend that the Commission's order was beyond its authority because not affording the carriers alternative methods of removing the discrimination and because the Milwaukee, for example, although having exclusive control of its low single-line rates, did not, with like effectiveness, control the higher joint-line rates. Both briefs rely on *Texas & Pacific Ry. Co.* v. *United States*, 289 U. S. 627.

In the first place, it should be clearly understood that the order is not, as suggested in Appellants' Brief in Opposition to the Motion to Affirm (p. 18), merely an order to desist from unjust discrimination, but is an order under section 15 (1) determining and prescribing the just and reasonable future rates. This is recognized in the allegations of appellants' bills (R. 9, 14, 38, 39) that the order requires the railroads "to publish and maintain rates in the future on a certain basis," and that that is the fact can be quickly demonstrated.

The present rates from the Illinois origin groups to Beloit are constants. There is no proposal to change them. As shown in Appendixes

A and D to the Commission's report, they are the rates which will apply and be applied for the future to Beloit, and they are shown in Appendix D as approved rates (R. 220). Now, Conclusion 2 to the report says that the rates from the Indiana groups to Beloit will result in undue preference and prejudice as between "(c) the Indiana districts on the one hand, and the Illinois districts on the other * * * to the extent that such rates would reflect rate relations between such districts and the respective points in each of such districts to Beloit, which differ from the relations reflected by the rates set forth as approved in appendices A and D to this report" (R. 210–211). It is obvious that with the rates from the Illinois groups to Beloit remaining constant, the relationships which the Commission requires to be maintained between the rates from Indiana to Beloit and the rates from Illinois to Beloit can be established only by the publication of the rates from the Indiana groups to Beloit that are set out in the report as approved rates. Those rates are, therefore, prescribed rates under the provisions of section 15.

The rates from Indiana to Beloit being specifically prescribed, it is clear that the interstate rates from Indiana to northern Illinois destinations are also specifically prescribed rates. The outstanding order of the Commission in the *Fairbanks-Morse* case, *supra*, requires the rates from the Indiana groups to Beloit to be not more than

15 cents higher than the rates to Rockford. To illustrate, with the rate from Brazil to Beloit prescribed at $2.22, as just demonstrated, the carriers may not under that order maintain less than the approved rate of $2.07 from Brazil to Rockford (R. 216). The same is true, of course, of the rates from the other Indiana groups.

So that, the rates approved by the Commission are the prescribed rates. That they are rates which the Commission determined would, for the future, be reasonable as well as nondiscriminatory is shown by its findings No. 19 (R. 210) and Conclusion No. 6, the latter reading (R. 212):

> 6. Rates in accordance with the foregoing findings and conclusions shall be made effective, so far as practicable, from all origins to all destinations at one and the same time, and will result in a reasonable, nondiscriminatory, and nonprejudicial adjustment from Indiana, Illinois, and western Kentucky to all points in the destination territory.

In contrast to the order here, the Commission's order involved in the *Texas & Pacific case, supra,* was an alternative order, leaving to the carriers whether to raise the preferential rates from Texas origins to the port of New Orleans or to lower the prejudicial joint rates from the same origins to the Texas ports. Originally the complaint charged, not only that the rates were unduly preferential and prejudicial, but also that the joint

rates to the Texas ports were unreasonable. The latter allegation was, however, withdrawn. The Texas & Pacific was party to the joint rates to the Texas ports and was, at the same time, charging from common points single-line rates the same in amounts for the much longer hauls to the port of New Orleans. This, it was contended, took traffic away from territory naturally tributary to the Texas ports, and the Commission found undue prejudice to the Texas ports and preference of New Orleans. Its order permitted the equalization to continue to a point where the hauls to New Orleans were greater by 25 percent, but for differences in distance in excess thereof, it prescribed certain minimum differentials. These differentials could, however, be either added to the New Orleans rates or deducted from the rates to the Texas ports, or they could be in part added to the one set of rates and in part deducted from the other set. Accordingly, the order was not an order under section 15 (1), since it did not remove the discrimination by prescribing the rates to that end.

It left with the carriers alternative methods of removing the discrimination, but the difficulty was that, while the Texas & Pacific could, acting alone, increase its individual, or single-line, rates to New Orleans, it was not left with an actual election, because it could not lower the joint rates to the Texas ports without the consent of the other

carriers, parties to those rates. This is precisely what the decision holds.[22] It says (289 U. S., at p. 650) that "Where an order is made under § 3, an alternative must be afforded," and that "The situation must be such that the carrier or carriers if given an option have an actual alternative." However, in a footnote, referring to the requirement that an alternative must be afforded, the opinion says:

> This is not true of an order pursuant to § 15 (1), prescribing maximum or minimum or maximum and minimum rates; but the present orders were not issued under that section.

Accordingly, it is evident that appellants altogether misconstrue the decision in the *Texas & Pacific case, supra.* If it is read having in mind that the order in the case was in fact an alternative order,[23] it will be seen that its statement that an alternative must be afforded has no application here but, instead, that it is square authority that that "is not true of an order pursuant to § 15 (1)."

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[22] The first holding was that ports, as such, were not localities within the meaning of section 3; that, as to traffic passing through them they were not susceptible to the undue prejudice or preference referred to; that the section's prohibitions were intended for the protection of shippers or shipper localities; and that, taking for example the origin localities in Texas, such origins were benefited rather than hurt, since the rate adjustment complained of afforded them a choice of routes and ports.

[23] See dissenting opinion, 289 U. S., at p. 668.

In *Youngstown Sheet & Tube Co.* v. *United States*, 295 U. S. 476 (opinion also by Justice Roberts) the distinction is further emphasized between a section 3 alternative order and one pursuant to section 15 (1), prescribing the rates or the maximum or minimum rates, etc. The traffic involved was coal moving from so-called river mines by barge to Colona, Ohio, and thence by rail to Youngstown. The railroads complained that the existing exbarge rates of 77 cents per ton were too low, threatening the rate structure, and asked to be permitted to establish rates of $1.02 cents. At the same time certain inland mines, shipping all-rail to Youngstown complained that the exbarge rates unduly preferred the river mines and prejudiced them. Based in part on comparison with rates in the general coal rate structure, the Commission determined and prescribed 90 cents as the minimum reasonable rate. Before this Court, the steel companies contended that the order was invalid because not affording the carriers an alternative. In answer, the Court said that there was no merit to the contention; that, while it was true that the Commission found undue prejudice to shippers all-rail, in essence its order was a section 15 order and not a section 3 order.

In the *Youngstown case, supra,* just as in the *Texas & Pacific case, supra,* the reason for terming an alternative order a section 3 order, was, it is apparent, to distinguish such an order from one

made under section 15. But in the *Youngstown case*, the Commission did proceed under section 15 (1). On the evidence before it, it determined and prescribed 90 cents as the minimum reasonable rate to be charged, and the Court particularly emphasizes the importance of that finding. Answering contentions that the order was invalid because the Commission raised the rate to prevent disruption of the rate structure and thus violated principles announced in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, the Court said (p. 480):

> In the first place the Commission here found the required minimum reasonable; in the second place, it had, after full investigation * * * held the existing rate structure * * * just and reasonable, and the ex-river rates here in issue, in contrast too low. Comparisons of other rates in the same or adjacent territory, while not a conclusive test of reasonableness of a rate under investigation, have probative value. There was much other evidence * * *. The order of the Commission was based primarily upon the reasonableness of the minimum prescribed. The existing rate structure furnished support for the finding of reasonableness.[24]

[24] The Court had previously summarized the Commission's findings, saying (p. 479):

"The Commission finds: These prescribed minima are reasonable; lower rates would create undue discrimination against shippers in origin districts who cannot use the

The importance of the emphasis laid by the decision on the Commission's finding of reasonableness of the prescribed minimum rate is that that finding marks the distinction between an alternative order and an order pursuant to section 15 (1). In the *Texas & Pacific* case, *supra*, it was said, as just shown, that the requirement of affording an alternative did not apply to an order made pursuant to section 15 (1). The only issue in that case was of undue preference and prejudice, but, if the record had contained the enabling evidence, the Commission could, presumably, have determined and prescribed the just and reasonable rates, or maxima or minima, to the end of removing the discrimination found. Section 15 (1) provides substantially that, whenever the Commission is of the opinion that any individual or joint rates, or any individual or joint regulations or practices, are or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in viola-

water-rail route, and would tend to disrupt the rate structure, and to destroy the proper differentials between various producing districts on shipments to Ohio destinations. These findings have ample support in the evidence."

It will be noted that here again the decision gives first importance to the Commission's finding that the prescribed minima are reasonable. It mentions the finding that lower rates would disrupt the rate structure but, when it comes to giving weight to that finding, it apparently regards the existing rate structure principally important as furnishing support for the prescription of the reasonable minimum rate to be charged.

tion of the Act, "the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate * * * or rates * * * to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged * * *." Accordingly, since the violations specified by the section as clothing the Commission with authority to act are in the disjunctive, it is clear that, upon findings of undue preference and prejudice alone, the Commission is empowered to determine and prescribe what will be the just and reasonable rates, individual or joint, in such case to be thereafter observed. But, as shown by the statute, if the Commission is to prescribe, it must first determine [25] what will be the just and reasonable future rates, and, to do that, the Commission must have before it the enabling evidence. In the *Texas & Pacific* case, *supra*, presumably such evidence was lacking, but in the present case the enabling evidence was ample.[26]

[25] This determination is the finding that marks the distinction between an alternative order and an order pursuant to section 15 (1). Existing unlawfulness other than that of undue preference and prejudice need not be found, but, as stated, if the Commission is to prescribe, it must first determine, or find, what will be the just and reasonable future rates, or the maxima or minima, and that is a finding in addition to the findings necessary where the Commission simply orders removal of undue preference and prejudice found.

[26] Since in an I. & S. case under section 15 (7) what is

Appellants, in their brief in opposition to the motion to affirm (p. 18) assert that it is no answer to their contentions to say that the order here was one pursuant to section 15 (1) and not a section 3 order, since all orders of the Commission are entered under section 15 (1). But this wholly ignores the distinction between section 3 alternative orders and orders pursuant to section 15 (1) pointed to in the two decisions of this Court, above discussed, and it also ignores the plain language of section 15 (1). Except for the minimum rate power given the Commission in 1920, section 15 (1) in substantially its present form was enacted by the Hepburn Act of 1906 (34 Stat. 584, 589–590), when for the first time the Commission was empowered to prescribe future rates. In addition to the authority conferred to prescribe maximum rates and to prescribe regulations and practices, the Commission was empowered to prescribe divisions of joint rates, to establish through routes and maximum joint rates and to determine and fix maximum reasonable allowances. The paragraphs comprizing section 15 were not at that time given numbers, but the last paragraph thereof

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involved is proposed rates, such a case, generally speaking, brings in issue all manner of future lawfulness, and particularly the fundamental prerequisites of lawfulness, that is, that the proposed rates will be reasonable, nondiscriminatory and nonprejudicial. That the parties were fully apprized that the present or existing rates were also in issue and that there was ample evidence in respect thereof has been discussed and shown in Chapter II, *supra*.

(which now appears as paragraph 14) provided that:

> The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.

The Commission had always issued alternative orders, or practically so. It may have had that authority under section 15, although, prior to 1906, that section spoke only of "a notice to said common carrier to cease and desist from such violation" (24 Stat. 384); but it seems especially plain that it had the authority under the provision of section 12, authorizing and requiring the Commission "to execute and enforce the provisions of this part."[27] This authority necessarily empowers the Commission to make orders (Cf. *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, 407), because in the case of administrative provisions such as those in section 3, enforcement is possible only through proceedings and orders of the Commission; that is to say, such provisions cannot be enforced directly in court. In any event, it is clear from the Court's decisions (see also *St. Louis, S. W.*

[27] This provision of section 12 provides:

"The Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States * * * to institute in the proper court and to prosecute * * * all necessary proceedings for the enforcement of the provisions of this part * * *."

Ry. Co. v. *United States*, 245 U. S. 136, 145) that the Commission has authority to make a section 3 alternative order and that such authority is a thing distinct and apart from its authority under section 15 (1).[28]

[28] This is further borne out by the penalty provisions (Sec. 16 (8)) which attach penalties for disobedience, not only of sections 15 and 13 orders, but also of section 3 orders. However, the fact that section 3 orders are distinguished from orders pursuant to section 15 (1) does not mean that when, upon findings of undue preference and prejudice, the Commission proceeds under section 15, it is not enforcing the prohibitions of section 3. Section 15 (1) does not declare anything unlawful. That it relies for unlawfulness on other provisions of the Act is shown by the fact that after specifying unreasonableness, unjust discrimination and undue preference or prejudice, it says or otherwise in violation of any of the Act's provisions. Moreover, this is made doubly plain by the decision in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.*, 257 U. S. 563. In that case this Court construed that particular provision of section 13 (4) which authorizes the Commission to act on State rates whenever it finds that they cause any unjust discrimination against interstate commerce, which, the section says, is hereby forbidden and declared unlawful. The Court interpreted the clause as forbidding State rates so low as to burden the interstate rates and, in doing so, it relied, among other things, on the fact that Congress picked out that particular clause to be followed by the phrase "which is hereby forbidden and declared to be unlawful." This brings out that the preceding clause as to State rates that cause undue prejudice against interstate shippers is not followed by a like phrase, presumably because already declared unlawful by section 3. *Houston & Texas Ry.* v. *United States* (*Shreveport* case, 234 U. S. 342). Thus, since section 13 (4) relies on section 3 for prohibitions against undue preference and prejudice, it seems plain that that is also true of section 15 (1).

The decision in the *Texas & Pacific case, supra,* in addition to holding that, where an order is made under section 3, an alternative must be afforded, holds that, in order that a carrier be guilty of undue prejudice, it must control both the prejudicial and preferential rates. It says in this connection (289 U. S. at p. 650):

> A carrier or group of carriers must be the common source of the discrimination—must effectively participate in both rates, if an order for correction of the disparity is to run against it or them. Where an order is made underr § 3 an alternative must be afforded.

This, it is evident, plainly attributes the need for effective participation in both rates to the fact that, in the case of a section 3 order (though not one pursuant to section 15 (1)), an alternative must be afforded. The decision had previously referred (p. 649) to the fact that the rule requiring control of both rates was one consistently followed by the Commission; and, speaking of the rule, the Commission's report said (*Galveston Com. Asso.* v. *Galveston, H. & S. A. Ry. Co.*, 160 I. C. C. 345, 356):

> * * * But it is contended for New Orleans that in order to be guilty of undue prejudice a carrier must control both the prejudicial and the preferential rate, because the method of removing the prejudice and preference must be left to the

> discretion of the carrier and the order requiring its removal must be in the alternative. This proposition finds support in *Ashland Fire Brick Co.* v. *S. Ry Co., supra,* and subsequent cases, such as *Allen Mfg. Co.* v. *A. G. S. R. R. Co.,* 126 I. C. C. 515, and *Hallsboro Mfg. Co.* v. *Atlantic Coast Line R. Co.,* 157 I. C. C. 124 * * *.

Referring to the same thing, the brief of the Ayrshire Collieries says (p. 55):

> We contend also that an order to remove an undue preference or prejudice must accord to the carriers affected an alternative of either reducing the higher rate or increasing the lower, or a combination of the two. To do this, the carrier or carriers involved must control both rates.

To repeat, therefore, the important consideration entering into the *Texas & Pacific case, supra,* is that there the order was a section 3 alternative order. That being the case, it was necessary that the carriers involved control both rates. Where, however, the order is one pursuant to section 15 (1), prescribing the maximum or minimum rates, etc., the decision clearly says that the requirement of affording an alternative does not apply, from which it follows that, in such case, there is no need that the carriers control both rates. The reason for this is plain on the face of the statute. Upon findings of undue preference or prejudice, section 15 (1) empowers the

Commission to determine and prescribe what will be the just and reasonable individual or joint rates in such case to be thereafter observed. Where through routes and joint rates already exist, there is no occasion to establish them. Section 15 (1) does not qualify the Commission's power where dealing with joint rates. Presumably Congress knew that cases of undue preference and prejudice confined to individual rates would cover but a minor portion of the field of authority intended to be placed with the Commission.

In *Houston, E. & W. Texas Ry.* v. *United States* (*Shreveport case*), 234 U. S. 342, this Court sustained as valid a Commission order requiring removal of undue preference and prejudice caused by the relation of intrastate and interstate rates. That order afforded an alternative and was made under section 3. Section 13 (4), enacted in 1920, empowered the Commission to deal directly with unduly preferential and prejudicial intrastate rates, clothing it with authority to prescribe the rates, or the maxima or minima or maximia and minima thereafter to be charged "in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination." The legislative history of this provision shows that its purpose was to do away with the need for alternative orders by empowering the

Commission to prescribe the rates, or the maxima or minima.[29] True, this is also shown by the succeeding words "in such manner as, in its judgment will remove such advantage, preference, prejudice, or discrimination." However, there is no real distinction in this respect between section 13 (4) and section 15 (1). While section 13 (4), in empowering the Commission to prescribe the intrastate rates thereafter to be charged does not in terms require that they be reasonable, it may not be assumed that the Commission is authorized to prescribe for the future other than reasonable State rates. That reasonableness of the rates prescribed is quite as essential in the case of intrastate rates as in the case of interstate rates is shown by decisions of this Court. *Georgia Comm.* v. *United States*, 283 U. S. 765, 770; *United States* v. *Louisiana*, 290 U. S. 70, 78. It seems beyond dispute that Congress, in enacting section 13 (4),

[29] Statement of Senator Cummins, Chairman of Senate Committee on Interstate Commerce (Cong. Rec., Vol. 59, pp. 141–143). Senator Cummins, speaking of the *Shreveport case*, *supra*, and others, said *inter alia*, at p. 142:

"We have not gone beyond the principles announced * * * we have simply given to the commission the authority to remove the discrimination when established. As it is now all that can be done is for the commission to go forward from time to time and condemn and enjoin the State rates until they finally reach the level which, in the judgment of the commission, is no discrimination."

intended to authorize a more effective means than alternative orders for dealing with discriminatory rates and it is not believed that, in empowering the Commission to remove discrimination in interstate rates, a lesser, more restricted, authority was conferred.

The brief of appellant Ayrshire Collieries contends (p. 60) that the order is invalid because the Commission did not find that the preferential rates were noncompensatory. There is nothing in the *Youngstown case, supra,* indicating that such a finding is necessary. Cf. *Scandrett* v. *United States,* 32 F. Supp. 995 (D. Oreg.), affirmed per curiam 312 U. S. 661. Moreover, this Court has repeatedly said that the evil of discrimination was the principal thing aimed at by the Act. *Shreveport case, supra,* (p. 356); *Louisville & N. R. R. Co. et al.* v. *United States,* 282 U. S. 740, 749. In *Interstate Commerce Commission* v. *Inland Waterways Corp.,* 319 U. S. 671, the Court, after referring to the zone of reasonableness, said, in effect, that while rates may lie within that zone, nevertheless they may result in undue prejudice and discrimination. Cf. *Jefferson Island Salt Mining Co.* v. *United States,* 6 F. 2d 315 (N. D. Ohio). In any event, in the present case, considering together the interstate and intrastate adjustments, it is inescapable that the existing interstate as well as intrastate rates were burdensomely low. This is

shown throughout the report and particularly by the Commission's findings in the intrastate case (R. 200, 202) and its formal finding No. 17 (R. 209), where it is said:

> 17. Respondents' loss in revenue as a direct result of the relatively low level of the intrastate rates assailed is not less than $55,000 per annum, and as an indirect result thereof by reason of the relatively low level of the interstate rates from Indiana to the same northern Illinois destinations, which are held down by the intrastate rates referred to, respondents are suffering an additional loss of revenue of not less than $50,000 per annum. Under the rate adjustment herein approved as reasonable and otherwise lawful from Illinois and Indiana to these northern Illinois destinations, respondents' annual revenues may reasonably be expected to be increased by at least the foregoing amounts.

The above, it will be seen, finds that the Indiana interstate rates as well as the Illinois intrastate rates are so low as to burden the carriers' revenues and, in effect, that, to remove that burden, they, as well as the Illinois intrastate rates, should be raised to the approved bases which the Commission finds would be reasonable and otherwise lawful from the respective Indiana and Illinois groups. The whole rate adjustment,

interstate and intrastate, was, of course, an integrated adjustment; and the Commission had previously said (R. 200) that, taken as a whole, and excluding the rates to Chicago which are affected to an unusual degree by competition "this integrated adjustment of Illinois intrastate and Indiana interstate rates to northern Illinois reflects the lowest level of any important track-delivery, coal-rate adjustment in the country." The Commission's order directly operating on the interstate rates from Indiana was the order in I. & S. No. 5139, but the Commission's findings (Conclusion No. 6, R. 212) made the whole adjustment, intrastate and interstate, approved as reasonable, nondiscriminatory, and nonprejudicial, an inseparably related and integrated adjustment. And, while certain of the interstate rates from the Indiana groups, both existing and proposed, were thereby lowered or left the same, the existing rates were for the most part raised. Moreover, the change of particular importance effected in the interstate rates from Indiana was that the adjustment of the single-line rates of the Milwaukee and Illinois Central which the Commission found would be reasonable, nondiscriminatory, and nonprejudicial, required that those rates be increased to the group, or joint-line, bases, so approved (R. 187, Appendix A to Report, R. 213–216). They were, therefore, pre-

scribed minima, and, as such, found reasonable and nondiscriminatory.

The Commission's Conclusion No. 3 (R. 211) finds that "the proposed rates from the Indiana districts to the northern Illinois destinations and to Beloit would be unreasonable to the extent that they would exceed the rates or rate bases set forth in the column headed 'Rate approved in this proceeding' in appendix A to this report." It follows, accordingly, that the rates approved from the Indiana groups are for the most part rates found and prescribed as reasonable minima and maxima or as *the* reasonable rates.

Appellants say that the Commission's action here conflicts with the Court's decision in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, whereas it was in effect undertaken in response to that decision. In the case in question the Court pointed out (pp. 509–510) that the Commission had "not adjudged the fairness of the relation now subsisting between Illinois and Indiana rates;" that "the whole situation is subject to the power of the Commission," in that the Commission "may fix the fair relation between one line and another, and may build the structure of the rates accordingly." By its decision here under attack the Commission attempted to do, and did, what this Court plainly indicated by the above language it should do.

CONCLUSION

For the reasons stated, the judgment of the District Court should be affirmed.

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APRIL 1947.

APPENDIX

Section 2 of the Interstate Commerce Act (Feb. 4, 1887, 24 Stat. 379, 49 U. S. C. 2, as amended, provides as follows:

> That if any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Section 3 (1) of the Interstate Commerce Act, as amended, particularly by the Act of September 18, 1940, 54 Stat. 902, provides as follows:

> (1) It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever;

or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 15 (1) of the Interstate Commerce Act, as amended, provides as follows:

(1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or

minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Section 15 (7) of the Interstate Commerce Act, as amended, provides:

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension,

may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and

reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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